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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 16 1995	D	Petition for writ of certiorari filed.
2	Apr 12 1995		Brief of respondent City of Atlanta, Georgia in opposition filed.
3	Apr 17 1995		Brief amicus curiae of National Parking Association filed.
4	Apr 19 1995		DISTRIBUTED. May 12, 1995 (Page 2)
5	Apr 25 1995	X	Reply brief of petitioners filed.
7	May 15 1995		REDISTRIBUTED. May 19, 1995 (Page 13)
9	May 22 1995		REDISTRIBUTED. May 26, 1995 (Page 15)
10	May 30 1995		Petition DENIED. Dissenting opinion by Justice Thomas with whom Justice O'Connor joins. (Detached opinion.)

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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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77 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a taking of property requiring payment of compensation under the Fifth Amendment when a municipal ordinance requires that the owners of 350 parking lots incur losses and bear expenses as follows:

(a) convert up to 10% of paved areas for landscaping purposes;

(b) spend approximately $4,375,000 to plant trees and landscape;

(c) lose approximately 3% of parking spaces;

(d) lose $1,636,000 in annual revenues from advertising signs obstructed by the trees; and

(e) bear the expense of perpetually maintaining the landscaping.

2. Whether a municipal ordinance requiring the owners of 350 parking lots to improve, landscape and maintain the lots at their expense and lose revenue from parking fees and advertising signs even though only the public will benefit from the improvements is a special assessment rising to the level of a taking without compensation in violation of the Fifth Amendment.

3. Whether a municipal ordinance requiring the owners of 350 parking lots having thirty spaces or more located in the downtown area to improve, landscape and maintain their lots at significant expense and loss of revenues, while exempting the owners of lots having less

QUESTIONS PRESENTED FOR REVIEW – Continued

than thirty spaces, unpaved lots, and lots located in other densely developed areas of the city from compliance, violates the equal protection clause of the Fourteenth Amendment.

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Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. *Parking Association of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994). (App., *infra*, p. 1a).

2. Order, Superior Court of Fulton County, Georgia, Case No. E-21249, entered March 3, 1994. (App., *infra*, p. 9a).

STATEMENT OF JURISDICTION

1. The date of the entry of the judgment or decree sought to be reviewed is November 28, 1994. On that date the Supreme Court of Georgia affirmed the order of the Superior Court of Fulton County, Georgia, entering judgment in favor of the respondent.

2. On December 20, 1994, the Supreme Court of Georgia entered an order denying petitioners' motion for reconsideration.

3. The statutory provision which confers jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Sections 16-14.012, 16-15.011, 16-18A.013, 16-18B.013, 16-18C.013, 16-18D.013 and 16-20C.003(18) of the Atlanta City Code. Because the aforesaid provisions are lengthy, the text of these sections of the Atlanta, Georgia, Code are set forth in the appendix attached hereto, at pp. 33a-42a, with a summary of the relevant provisions being set forth at pp. 45a-48a.

STATEMENT OF THE CASE

A. Statement Of Facts

On May 18, 1992, the respondent enacted an ordinance governing commercial and noncommercial surface parking lots (hereinafter the "Parking Lot Ordinance") located in seven downtown and midtown zoning districts (hereinafter the "Affected Zoning Districts"). The ordinance applies retroactively to existing legally permitted parking lots. It requires minimum barriers, curbs and landscaping in all surface parking lots in the Affected Zoning Districts having a total of thirty or more parking

spaces, whether primary or accessory in use and whether commercial or noncommercial in nature. Parking lots having less than thirty parking spaces and unpaved lots are exempted. Moreover, lots located in most of the developed areas of the city are also exempted because the ordinance is applicable only to a narrow corridor along Peachtree Street from downtown to midtown Atlanta.

The ordinance requires the owners of the affected lots to install barriers around the perimeters of the lots and to create landscaped areas in the lots equal to at least ten percent of the paved area. The landscaped areas must include one tree per eight parking spaces and shrubs and ground cover between trees. The ordinance provides minimum size requirements for the trees and mandates continued maintenance of the landscaped areas at the owners' expense. All expenses of compliance, including the initial expense and long term maintenance, must be borne by the owners of the affected lots. No government funds are made available to compensate those affected.

The ordinance applies to an estimated 350 parking lots. Compliance will cost private landowners about $12,500 per lot meaning that the cost of compliance for the affected lots will total approximately $4,375,000. Commercial parking lot owners will also lose income from parking fees due to a diminution in parking spaces caused by compliance. Further, many parking lot operators will lose the rental income from advertising signs located on the properties. This is because the sign companies will cancel their leases with the lot owners and remove billboards once they are obstructed by the trees required to be planted. The amount of the lost rental income will be substantial. In addition, the two sign

companies who are petitioners in this case will lose over $1,636,000 in annual revenues once the trees are planted. This loss will result directly from cancelled and non-renewed advertiser contracts because the affected signs will no longer be visible to the traveling public.

The respondent did not recognize or consider the rental loss to the parking lot operators and the loss of advertising revenues to the sign companies when it enacted the ordinance. The ordinance does not provide for payment of compensation by the City of Atlanta to those required to expend funds to comply, nor to those whose income is reduced as a result of lost parking spaces and advertising signs.

B. History Of Proceedings

This action was commenced on October 15, 1993, in the Superior Court of Fulton County, Georgia. (App., *infra*, p. 15a). The complaint contains five counts. Count I is a challenge to the Parking Lot Ordinance based upon the takings clause of the Fifth Amendment to the United States Constitution, made applicable to the City of Atlanta through the Fourteenth Amendment. (App., *infra*, pp. 15a-22a). Count I alleges that the Parking Lot Ordinance violates the Fifth Amendment by failing to provide for compensation by the City of Atlanta to those required to expend funds to comply with the ordinance; for failing to provide compensation to those whose income is reduced as a result of lost parking spaces; and for failing to provide compensation to others whose businesses are affected by compliance with the ordinance. Count II alleges a violation of the takings clause of the Fifth

Amendment by indirectly imposing a special assessment against the owners of all surface parking lots covered by the ordinance even though the ordinance requires the owners and operators to make improvements that, while perhaps valuable to others, are useless to them. (App., *infra*, pp. 22a-23a). Count III alleges that by applying only to owners and operators of surface parking lots located within the Affected Zoning Districts and, within those districts, only to surface parking lots having a total of thirty or more parking spaces, the Parking Lot Ordinance violates the equal protection clause of the Fourteenth Amendment. (App., *infra*, pp. 23a-24a). Count IV alleges that the Parking Lot Ordinance is invalid because it is a remedial ordinance based solely on aesthetic considerations. (App., *infra*, p. 25a). Count V alleges that requiring the petitioners to expend substantial funds to plant vegetation in their parking lots and to eliminate parking spaces is unreasonable and void as a matter of public policy because the requirement bears no rational relation to the public health, safety and welfare. (App., *infra*, pp. 25a-26a). The Fifth and Fourteenth Amendment allegations contained within counts I, II and III are the subject of this petition for certiorari.

On December 20, 1993, the petitioners filed a motion for interlocutory injunction. The trial court consolidated the petitioners' prayer for temporary and permanent injunctive relief with a trial on the merits. On March 3, 1994, the trial court ruled that the ordinance does not violate the Fifth or Fourteenth Amendments to the United States Constitution. (App., *infra*, pp. 9a-13a). The trial court also ruled that the claims of the petitioners set forth in counts IV and V of the complaint were without merit.

The petitioners appealed, raising their federal constitutional claims, together with other claims, as grounds for the appeal. (App., *infra*, pp. 28a-32a). The trial court's order was affirmed by the Supreme Court of Georgia on November 28, 1994, with three of the seven justices dissenting. (App., *infra*, pp. 1a-8a). The Supreme Court of Georgia has stayed the implementation of the ordinance pending this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Supreme Court Of Georgia Upholding The Parking Lot Ordinance Is In Conflict With *Nollan v. California Coastal Commission* And *Dolan v. City Of Tigard*.

The petitioners are owners of parking lots in the downtown and midtown areas of the City of Atlanta. Prior to the enactment of the ordinance challenged in this case, the petitioners' parking lots were properly zoned for the uses for which they were being operated and all necessary licenses and permits for their operation had been issued. After the enactment of the ordinance, the petitioners' properties continue to be zoned for the uses for which they are being operated and the petitioners still have all necessary licenses and permits to operate their parking lots. However, because of the enactment of the Parking Lot Ordinance the petitioners are required to spend, collectively with the owners of other affected

parking lots, $4,375,000 to remain in business.[1] The effect of the ordinance, therefore, is not to rezone the petitioners' tracts, because the uses permitted in the zoning districts in which their properties lie remain the same. Instead, the ordinance requires substantial expenditures and loss of income by the petitioners in order to continue the uses previously allowed. Accordingly, due to the nature of the challenged ordinance, this case is completely different from a case in which the Court is asked to review the constitutionality of a governing authority's rezoning decision relating to a particular tract of land. In short, this is a regulatory takings case, and not a rezoning case.

Relying solely upon *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the Supreme Court of Georgia upheld the Parking Lot Ordinance against petitioners' Fifth Amendment attack. The court did so because it concluded that the ordinance "advances legitimate governmental interests and leaves the plaintiffs with an economically viable use in their property." *Parking Association of Georgia v. City of Atlanta*, 264 Ga. 764, 766 at n.3, 450 S.E.2d 200, 203 at n.3 (1994). In addition, the court concluded that the petitioners' reliance upon *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), was misplaced. Ignoring the ordinance's mandated expenditure of private funds, the court stated that

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[1] In addition, the outdoor advertising petitioners will suffer losses totalling $1,636,000 each year resulting from lost revenue due to vegetation covering their signs and the parking lot owners will suffer a loss of parking fees due to the elimination of up to three percent of their parking spaces and a loss of sign rentals due to the obstruction of the billboards.

"the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands." *Id.* The court attempted to distinguish *Dolan* by noting that the aggrieved landowner in that case was actually required to grant an easement to the city as a condition to receipt of a city permit even though the city did not make some sort of individualized determination that the required dedication was related both in nature and extent to the impact of the proposed development.

The Supreme Court of Georgia erred in applying the holding of *Agins v. Tiburon, supra,* to this case and in concluding that *Dolan v. City of Tigard, supra,* does not compel a different conclusion. As a result, the opinion below is in conflict with controlling precedent of this Court and should be reversed.

In *Agins*, after the plaintiffs acquired five acres of unimproved property in the City of Tiburon, California, and before the plaintiffs had begun any efforts to develop the property, the city modified existing zoning requirements. The plaintiffs contended that the modifications restricting the use of their property constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. In upholding the zoning ordinances, this Court concluded that the plaintiffs "will share with other owners the benefits and burdens of the City's exercise of its police power" and that the "zoning ordinances benefit the appellants as well as the public by serving the City's interest in assuring careful and orderly development of residential property with provision for open space areas." 447 U.S. at 262, 100 S.Ct. at 2142.

The facts of this case differ sharply from those considered in *Agins*. In enacting the Parking Lot Ordinance, the City of Atlanta did not alter the zoning regulations applicable to the petitioners' property as they relate to future development. Instead, it required the petitioners to take costly affirmative remedial measures in the name of aesthetics in order to continue to operate pre-existing businesses on their properties. Moreover, the ordinance requires the petitioners to forego substantial income on a permanent basis in order to comply. Rather than being comparable to an ordinance requiring the preservation of open space, the Parking Lot Ordinance requires the creation of open space through the destruction of improved property at the landowner's sole expense.

The ordinance under review here is more closely compared to the ordinance reviewed by this Court in *Dolan*. In *Dolan* the owner of a plumbing and electric supply store applied to the City of Tigard, Oregon, for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store and paving a 39 acre parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, the plaintiff proposed to build an additional structure on the northeast side of the site for complimentary businesses, and to provide more parking. The city planning commission granted the plaintiff's permit application subject to the requirement that she dedicate sufficient open-land area for greenway adjoining and within the flood plain including portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the flood plain. The dedication required

by that condition encompassed approximately 7,000 square feet, or roughly ten percent of the property. The plaintiff contended that the dedication requirement failed to meet the nexus test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and thus violated her rights under the Fifth and Fourteenth Amendments to the United States Constitution.[2]

In analyzing the plaintiff's claims in *Dolan*, the Court first distinguished the plaintiff's claims from those presented in rezoning cases such as *Agins v. Tiburon, supra*, stating as follows:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioners' application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own

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[2] In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the issue presented was whether the California Coastal Commission could constitutionally impose as a condition to approval of a rebuilding permit a requirement that the applicants provide lateral access to the public to pass their beachfront property. The Court held that no nexus existed between the government's interest in visual access to the ocean from the roadway and a permit condition requiring lateral public access along the applicants' beachfront lot. Thus, the Court concluded that that exaction of the easement without compensation violated the applicants' Fifth Amendment rights. 483 U.S. at 837, 107 S.Ct. at 3148.

parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra*, we held the governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. *See Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

___ U.S. at ___, 114 S.Ct. at 2316-17.

While this Court concluded in *Nollan* that to pass constitutional muster under the Fifth Amendment an essential "nexus" must exist between "the legitimate state interest" and the condition exacted by a city, 483 U.S. at 837, 107 S.Ct. at 3148, it was not until the Court considered the issues presented in *Dolan* that it decided the required degree of connection between the exactions and the projected impact of the proposed development. ___ U.S. at ___, 114 S.Ct. at 2309. After discussing various tests being used by other courts, this Court concluded that a "city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." ___ U.S. at ___, 114 S.Ct. at 2319-20. The Court called this test "rough proportionality." Having established this test, the Court then considered the facts before

it and concluded that "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." ___ U.S. at ___, 114 S.Ct. at 2321.

Like the plaintiff's claim in *Dolan*, the petitioners' claims in this case are distinguishable from the rezoning cases represented by *Agins*. First, the Parking Lot Ordinance is not a legislative determination classifying an entire area of Atlanta. Instead, it affects only a narrow corridor of the city adjacent to the business district's main thoroughfare. Second, and more importantly, it does much more than impose conditions limiting the petitioners' uses of their parking lots. Like the affirmative obligation to grant an easement placed on the plaintiff in *Dolan*, the ordinance challenged here requires the petitioners to take costly affirmative steps as a condition to the continued operation of their businesses. The result is that the ordinance imposes an "unconstitutional condition" under *Dolan* – the exaction of money and loss of income from the petitioners in exchange for a public improvement not benefitting the petitioners in the least.

In considering this case under *Nollan* and *Dolan*, it is clear that the petitioners should prevail. The Fifth Amendment is offended because the Parking Lot Ordinance's exaction – the requirement that parking lot owners improve and landscape their properties at their own expense as a condition to remaining in business – is not "roughly proportional" to the "projected impact" of a "proposed development." In this case, there is no proposed development and thus no projected impact for the Court to consider. The result is there can be no "rough

proportionality" because without any proposed development one side of the equation – the projected impact – is non-existent. The conclusion follows that the direct financial burdens of the ordinance constitute a taking because there is no benefit to the landowner resulting from compliance with the ordinance.

In contrast to the majority decision entered below, the dissent properly recognized the application of *Nollan* and *Dolan* to this case, stating as follows:

> Extractions for the public benefit are generally upheld if the two requirements are met: First, that the extraction is closely related to a particular problem generated by the owner's use of his land, 1 Ziegler at § 6.10[1], [6][c]; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-840, 107 S.Ct. 3141, 3147-3150 (1986); *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); and second, that the extraction represents the property owner's proportion of the particular problem, 1 Ziegler at § 6.10[1], [6][c]; *Nollan*, 483 U.S. at n.4, 835-36, 107 S.Ct. at n.4, 3147-48; *Dolan*, 512 U.S. at ___, 114 S.Ct. at 2319, 129 L.Ed.2d at 320. A host of courts have applied these standards both before and after *Nollan*. *See* 1 Ziegler, § 6.10. A significant feature of the benefit extraction analysis is that an extraction may constitute a taking under it even though it would not under the "economically viable use" or "significant detriment" test. *See* 1 Ziegler, § 6-10[1]; *Dolan*, ___ U.S. at ___, 114 S.Ct. at 2136, n.6, 129 L.Ed.2d at 316, n.6.

264 Ga. at 768, 450 S.E.2d at 204 (footnotes omitted). Thus, the dissent understood that a taking has occurred through the enforcement of the ordinance even though no

physical governmental invasion of the petitioners' property has occurred.

In *Nollan*, the Court discussed a hypothetical situation strikingly similar to the facts presented here. The Court stated:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *see also San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978).

483 U.S. at 835 n.4, 107 S.Ct. at 3148 n.4.

The respondent does not contend that the petitioners have disproportionately contributed to an unsightly or unhealthy downtown business district by constructing and operating their parking lots. Indeed, the petitioners' businesses were built and are being operated pursuant to the respondent's own building and zoning codes. Nevertheless, the respondent has attempted to require the petitioners to bear the entire expense of making the city more aesthetically pleasing by requiring the planting of

trees and vegetation in spite of the Fifth Amendment's purpose "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835 n.4., 107 S.Ct. at 3148 n.4. *See also Florida Rock Industries v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (a governmental regulation fails Fifth Amendment scrutiny unless the government has acted in a responsible way, has limited the constraints on property ownership to those necessary to achieve the public purpose, and has not improperly allocated a burden that should be borne by all). Placing the burden of aesthetically improving downtown Atlanta solely on the petitioners, who will reap no benefit from their expenditure and will instead suffer diminished income, violates the Fifth Amendment's just compensation requirement. For that reason, the petitioners' application for a writ of certiorari should be granted so that the erroneous decision of the Supreme Court of Georgia may be reversed.

II. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Requires The Owners And Operators Of Surface Parking Lots Within The Affected Zoning Districts To Make Improvements That, While Perhaps Valuable To Others, Are Useless To Them.

By imposing the financial burden of complying with the Parking Lot Ordinance on the owners and operators of surface parking lots within the Affected Zoning Districts, the ordinance indirectly imposes a special assessment against all surface parking lots located within the

affected districts. As a result, the Parking Lot Ordinance imposes a financial burden on certain petitioners in substantial excess of any special benefits accruing to them and, as a result, is a taking of private property for public use without compensation in violation of the Fifth Amendment. While a special assessment is usually paid to a governing authority who then contracts for certain improvements, this ordinance achieves the same result by requiring the owners of parking lots to pay for the improvements themselves. Accordingly, the ordinance is subject to special assessment analysis.

In analyzing the validity of a special assessment, the principal question is whether the government is acting primarily to advance the public convenience, or is acting principally for the local benefit of a particular individual or group of individuals. In the latter case, all of the costs of an improvement may be placed upon the property owner or owners benefitted by the improvements. Where, however, government acts primarily for the public convenience, utility or advantage, an exaction is valid only where there is a direct benefit to the assessed landowner and a fair standard of apportionment of the costs is used. *Hancock v. City of Muscogee*, 250 U.S. 454, 39 S.Ct. 528, 63 L.Ed. 1081 (1919); *Brisco v. Rudolph*, 221 U.S. 547, 31 S.Ct. 679, 55 L.Ed. 848 (1911). *See also Yee v. City of Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992) (compensation is required where governments regulate uses of property if the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole).

In *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), the Court held that a local government takes private property without just compensation when, through a special assessment on land, it compels a landowner to pay for a public improvement in an amount "in substantial excess of the special benefits accruing to him." 172 U.S. at 279, 19 S.Ct. at 190. The Court stated as follows:

> [T]he principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is particularly benefitted, and, therefore, the owners do not, in fact, pay anything in excess of what they received by reason of such improvement. But the guarantees for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. . . . In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

172 U.S. at 278-79, 19 S.Ct. at 190-91.

Similarly, in *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916), the Court struck down the inclusion in a drainage district of elevated land that had no need of drainage and therefore

could derive no benefit from the construction of drainage ditches. The Court stated that when a special assessment district is "formed to include property which is not and cannot be benefitted directly or indirectly . . . there is an abuse of power and an act of confiscation." 239 U.S. at 485, 36 S.Ct. at 206. *See also* McQuillan, 14 Municipal Corp. § 38.02.10 (3rd ed. 1987) (a special assessment is void when levied under a rule which makes it possible for the assessment to exceed the benefit to the land in question). As summarized in *Furey v. City of Sacramento*, 780 F.2d 1448 (9th Cir. 1986), citing *Norwood* and *Myles Salt Co.*, "put in general terms, government may not force a landowner to make an improvement that, while valuable to others, is useless to him." 780 F.2d at 1454.

The respondent's stated purpose for the enactment of the Parking Lot Ordinance is to benefit the public at large, rather than the owners and operators of the parking lots themselves. (App., *infra*, pp. 34a-35a). Accordingly, since the ordinance requires the expenditure of funds by parking lot owners for aesthetic improvements to their property which fail to benefit the owners directly or indirectly "there is an abuse of power and an act of confiscation." *Myles Salt Co., supra*, 239 U.S. at 485, 36 S.Ct. at 206.

The Supreme Court of Georgia erred in failing to hold that the Parking Lot Ordinance imposes financial obligations in the nature of special assessments in excess of any benefits accruing to the petitioners. In so doing, the court's holding conflicts with this Court's controlling precedent in *Norwood* and *Myles Salt Co.*, and should be reversed.

III. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Violates The Equal Protection Clause Of The Fourteenth Amendment.

The Parking Lot Ordinance applies to only seven of the respondent's 38 zoning districts. (App., *infra*, pp. 33a-42a). The Affected Zoning Districts are in a narrow corridor along Peachtree Street, the city's main thoroughfare, from downtown to midtown. The rest of the city, including many commercial and industrial zoning districts[3] have been omitted. In addition, even in the Affected Zoning Districts, the ordinance excludes from its regulations unpaved vacant lots, whether they be used for parking or otherwise, and parking lots having less than thirty spaces.

The Fourteenth Amendment to the United States Constitution guarantees "the equal protection of the laws." The Amendment "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, ___ U.S. ___, ___, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). The Equal Protection Clause requires that governmental classifications rationally further a legitimate state interest.

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[3] Omitted are numerous highly developed areas wherein lie numerous large surface parking lots. These include Buckhead, an area home to the city's largest shopping malls, numerous hotels and commercial office buildings; the Atlanta Industrial Park; and the Atlanta-Fulton County Stadium, home of the Atlanta Braves.

Because the respondent has included some parking lots while excluding others, the burden rests on the respondent to explain how parking lots located in the affected districts legitimately differ from those located in other highly-developed areas of the city. The respondent also has the burden to explain how lots of less than thirty parking spaces differ from those with more, and how vacant, unpaved lots, which many would argue are the respondent's greatest eye sore, are legitimately different from the paved lots affected by the ordinance.

The respondent's burden cannot be met because there is no rational or legitimate differentiation among the affected lots and those that are exempt. Whether they are paved or unpaved, large or small, in downtown Atlanta or in outlying Buckhead, all paved parking lots look alike and have the same characteristics. There is no rational basis for requiring some to improve themselves aesthetically at the owner's expense, while similarly situated others are allowed to remain in their present condition. The Supreme Court of Georgia erred in upholding the ordinance despite its unequal treatment of similarly situated landowners. The ordinance clearly violates the petitioners' rights to the equal protection of the laws and this Court should grant petitioners' writ of certiorari to correct this error.

CONCLUSION

This case is appropriate for the grant of a writ of certiorari under Sup. Ct. R. 10.1(c) because the Supreme Court of Georgia has rendered an important decision in conflict with controlling decisions of this Court.

Specifically, the Supreme Court of Georgia has held that a remedial land use ordinance enacted in the name of aesthetics requiring owners of parking lots to expend substantial funds and lose substantial revenues by landscaping their own parking lots at their own expense without any compensation from the city is not a taking under the Fifth Amendment, in conflict with this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and instead has erroneously concluded that the challenged ordinance is similar to a mere rezoning of undeveloped property, as was upheld in *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

Moreover, the decision entered by the Georgia Supreme Court conflicts squarely with this Court's controlling precedent relating to special assessments in *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), and *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916).

This case also presents a significant question of federal law which has not been, but should be settled by this Court, fulfilling the requirements for the grant of a writ of certiorari contained within Rule 10.1(c). The question here presented yet unanswered by this Court is whether the "rough proportionality" test announced in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), applies to land use regulations made retroactively applicable to businesses previously in compliance with the then existing land use laws when the new land use regulations require affirmative financial remedial actions in the name of aesthetics.

Finally, this case meets the requirements for the grant of the writ of certiorari because the Supreme Court of Georgia has improperly analyzed the challenged ordinance in light of the appropriate equal protection analysis set forth in this Court's precedents.

For these reasons, the petitioners respectfully request that their petition for writ of certiorari be granted.

This the 15 day of March, 1995.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: NOV 28 1994

S94A0975. PARKING ASSOCIATION OF GEORGIA, INC. et al v. CITY OF ATLANTA, GEORGIA

THOMPSON, Justice.

The City of Atlanta enacted a zoning ordinance aimed specifically at surface parking lots with 30 or more spaces in several downtown and midtown zoning districts. The ordinance requires minimum barrier curbs and landscaping areas equal to at least ten percent of the paved area within a lot, ground cover (shrubs, ivy, pine bark or similar landscape materials) and at least one tree for every eight parking spaces. Its stated purpose is to improve the beauty and aesthetic appeal of the City, promote public safety, and ameliorate air quality and water run-off problems. All costs of compliance with the ordinance are to be borne by the landowners; however, no landowner is required to reduce the number of parking spaces by more than three percent.

Plaintiffs, an association of companies managing or owning surface parking lots in the affected areas, as well as individual owners of affected parking lots, brought suit against the City seeking declaratory and injunctive relief on the grounds that the ordinance is unconstitutional and void. The superior court ruled in favor of the City and denied injunctive relief. Plaintiffs appealed.

1. The zoning ordinance does not authorize a permanent physical taking or occupation of plaintiffs' property by another; it merely regulates the use of plaintiffs' property. Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (102 SC 3164, 3171, 73 LE2d

868) (1982) with *Yee v. City of Escondido*, ___ U.S. ___ (112 SC 1522, 1526, ___ LE2d ___) (1992). Thus, the ordinance does not constitute a per se taking entitling plaintiffs to compensation. It follows that we must assess and weigh the purposes and economic effects of the ordinance to determine if it "exceeds the police power in regulating land use for zoning . . . [and] run[s] afoul of the constitutional prohibition against condemnation of land for a public purpose without just compensation. [Cit.]" *Fulton County v. Wallace*, 260 Ga. 358, 360 (393 SE2d 241) (1990).

2. "This state uses a balancing test to determine whether the police power has been properly exercised. This test weighs the benefit to the public against the detriment to the individual. The factors to be considered are set forth in *Guhl v. Holcomb Bridge Rd. Corp.*, 238 Ga. 322 (232 SE2d 830) (1977). A zoning ordinance is presumptively valid, and this presumption can be rebutted only by clear and convincing evidence. *Guhl v. Holcomb Bridge Rd. Corp.*, supra. The burden is on the plaintiff to come forward with clear and convincing evidence that the zoning presents a significant detriment to the landowner and is insubstantially related to the public health, safety, morality and welfare." *Gradous v. Board of Commrs.*, 256 Ga. 469, 470 (349 SE2d 707) (1986).

Plaintiffs failed to present clear and convincing evidence that the ordinance presents a significant detriment. Plaintiffs may experience a loss of profits due to a reduction in the number of available parking spaces[1] and the

[1] Plaintiffs may also experience a decline in billboard rentals because the required trees may obstruct their view.

costs of compliance;[2] however, a zoning ordinance does not exceed the police power simply because it restricts the use of property, diminishes the value of property, or imposes costs in connection with the property. See *Gradous v. Board of Commrs.*, supra at 471; *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465 (254 SE2d 846) (1979). A loss of at most three percent of plaintiffs' parking spaces does not constitute a significant deprivation. Cf. *Lamar Advertising of South Georgia, Inc. v. City of Albany*, 260 Ga. 46 (389 SE2d 216) (1990) (sign ordinance which destroys substantial part of business without compensation is unconstitutional).

Plaintiffs also failed to present clear and convincing evidence that the ordinance is unsubstantially related to the public health, safety, morality and welfare. The ordinance was designed to regulate aesthetics, crime, water run-off, temperature and other environmental concerns. The means adopted have a real and substantial relation to the goals to be attained.

An ordinance is not unreasonable even if designed only to improve aesthetics. "[L]egislation based on aesthetics is within the public welfare aspect of the police power. 'The concept of the public welfare is broad and inclusive. (Cit.) The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully

[2] Estimated cost of compliance for all lots is $4,375,000; estimated cost of compliance for a typical lot with fifty parking spaces is $12,500.

patrolled.' [Cits.]" *H & H Operations, Inc. v. City of Peachtree City,* 248 Ga. 500, 501 (283 SE2d 867) (1981).

"If the plaintiff does not meet the initial burden of showing both significant detriment and insubstantial relationship to the public health, safety, morality and welfare, there is no need for the governing authority to present any evidence justifying the zoning. [Cit.]" *Gradous v. Board of Commrs.*, supra at 471. Plaintiffs failed to meet either prong of this state's balancing test. The ordinance is constitutional and valid.[3]

3. Plaintiffs assert the ordinance constitutes an unconstitutional denial of equal protection because it only applies to paved parking lots with 30 or more spaces in downtown and midtown zoning districts. We disagree.

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[3] The ordinance passes constitutional muster under federal taking analysis, too. It advances legitimate governmental interests and leaves the plaintiffs with an economically viable use in their property. *Agins v. Tiburon,* 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980).

Plaintiffs' reliance upon *Dolan v. City of Tigard,* ___ U.S. ___ (114 SC 2309, ___ LE2d ___) (1994), is misplaced. In that case, the city required an applicant for a building permit to deed portions of her property to the city. The Supreme Court held the required dedication violated the Takings Clause because the city did not "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the development." Id. at 2319. Here the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands. Moreover, the city demonstrated a "rough proportionality" between the requirements and objectives of the ordinance. See id.

A zoning ordinance does not offend the equal protection clauses of the State and Federal Constitutions if "it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation. [Cit.]" *Bailey Investment Co. v. Augusta-Richmond County Board of Zoning Appeals,* 256 Ga. 186, 187 (345 SE2d 596) (1986). The larger lots have a far greater impact upon aesthetics, water run-off, temperature, pedestrian traffic and other health, safety and environmental concerns; the affected districts have the greatest concentration of parking lots. Thus, the ordinance rationally differentiates between larger and smaller parking lots and between affected and unaffected zoning districts. " 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.' " *DeKalb County v. Chamblee Dunwoody Hotel Partnership,* 248 Ga. 186, 190 (281 SE2d 525) (1981) (quoting *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (47 SC 114, 71 LE 303) (1926)).

Judgment affirmed. All the Justices concur, except Hunt, C.J., Sears and Carley JJ., who dissent.

S94A0975. PARKING ASSOCIATION OF GEORGIA, INC. v. CITY OF ATLANTA.

SEARS, Justice, dissenting.

I disagree with the majority's application of the significant detriment test to this case. That test is essentially the same as the "economically viable use" test employed

by the United States Supreme Court. See Ziegler, Rathkopf's The Law of Zoning and Planning, § 6.08 [1]. The significant detriment test looks to the land as a whole to evaluate a takings claim, as well as to factors to consider such as " 'the suitability of the subject property for the zoned purposes,' " *Guhl v. Holcomb Bridge Road Corp.*, 238 Ga. 322, 323 (232 SE2d 830) (1977), and "the character of the neighborhood, the zoning, and the use of properties nearby," Ziegler, § 6.08 [1], at 6-34. Although that test and some of its factors are well-suited to rezoning cases, they are not well-suited to cases such as this one in which a local government has sought to extract a benefit for the public from only a portion of a whole parcel of property. In such cases, courts have established an exception to the "economically viable use" or "significant detriment" takings standard.

> [A] regulation may be held a taking, even though the owner is afforded an econonmically [sic] viable use of the property, under benefit-extraction taking analysis when the burden imposed by [the] regulation is found to be one that, as a matter of fairness and justice, should be borne by the public as a whole. [Ziegler, § 6.08 [1], 6-29, n. 4.]
>
> This line of taking analysis reflects the traditional distinction, often noted in commentary and court decisions, between regulation that performs an arbitration or harm prevention function, where the result sought to be achieved distinctly relates to some problem involving or generated by a private owner's activity or proposed use, and regulation that simply secures a public benefit . . . at the unfair expense of private owners who are simply convenient targets

> of opportunity for extracting the benefit. [Id. at § 6.10 [1], 6-91, 6-92.]

Extractions for the public benefit are generally upheld if the two requirements are met: First, that the extraction is closely related to a particular problem generated by the owner's use of his land, 1 Ziegler at § 6.10 [1], [6] [c]; *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 835-840 (1986); *Dolan v. City of Tigard*, 512 U. S. ___ (114 SC ___, 129 LE2d 304) (1994); and second, that the extraction represents the property owner's proportion of the particular problem, 1 Ziegler at § 6.10 [1], [6] [c]; *Nollan*, 483 U. S. at n. 4, 835-36; *Dolan*, 129 LE2d at 320. A host of courts have applied these standards both before and after *Nollan*. See 1 Ziegler, § 6.10.[1] A significant feature of the benefit-extraction analysis is that an extraction may constitute a taking under it even though it would not under the "economically viable use" or "significant detriment" test. See 1 Ziegler, § 6-10 [1]; *Dolan*, 129 LE2d at 316, n. 6.[2]

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[1] Thus, for instance, under this analysis, an ordinance requiring a junkyard to erect some buffer around its business would in all liklihood [sic] pass constitutional muster.

[2] I do not decide in this dissent whether the property owners or the city should have the burden of proof, as I conclude the property owners should prevail even if they have the burden. However, *Dolan* lends support to the proposition that the city should bear the burden. In *Dolan*, the Supreme Court placed the burden on the city because it had singled out a particular parcel to bear an extraction. *Dolan*, 129 LE2d at 320, n. 8. Here, the city has singled out a particular use within the city to bear the extraction. Moreover, the city has retroactively imposed the extraction. These are persuasive reasons to require the city to justify the extractions.

In addition to the factors mentioned above, I think several other factors are relevant to a benefit-extraction analysis in this case. One is that, typically, extractions of this kind are imposed upon private owners at the developmental stage of property use. 1 Ziegler, § 6.10 [6] [a]. At that stage, the owner has the option to decline to develop if the extractions are too costly. Here, the property owners have no such choice. Although the retroactive nature of an extraction might not be decisive if the property owners use of the property clearly necessitated the extraction, it should weigh against the local government in the fairness equation if the government's justification for the extraction is weak.

Finally, in analyzing whether an extraction is an expense that in fairness and justice should be paid for by the public as a whole, I would consider the nature of the governmental interest at stake. For instance, if, in fact, an extraction would actually promote nothing more than the aesthetics of the community, rather than a more compelling public interest such as the public safety, I would weigh that factor against the local government.

As the benefit-extraction analysis test that I propose has not previously been utilized in this state, I would remand this case to the trial court for it to resolve the case using this analysis. I am authorized to state that Chief Justice Hunt and Justice Carley join in this dissent.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PARKING ASSOCIATION OF GEORGIA, INC., ET AL., Plaintiffs, v. CITY OF ATLANTA, Defendant.	CIVIL ACTION FILE NO. E-21249

ORDER

(Filed Mar. 3, 1994)

This case, seeking an injunction and a declaratory judgment regarding an ordinance of the City of Atlanta, having been heard by the Court and briefs of the parties and affidavits having been submitted, and the Court having considered the same, the Court hereby finds as follows:

1.

The facts in this case are generally not in dispute. In May, 1992, the City of Atlanta enacted a new ordinance (the "Parking Lot Ordinance") regulating parking facilities in a portion of the City of Atlanta.

2.

The Parking Lot Ordinance requires minimum barriers, curbs and landscaping in all surface parking lots

having a total of 30 or more parking spaces in the downtown and midtown commercial districts of the City of Atlanta. The Parking Lot Ordinance also regulates parking attendants, lighting, maintenance and signage. The Parking Lot Ordinance does not provide for any compensation by the City of Atlanta to those required to comply with the Ordinance.

3.

The stated purposes of the Parking Lot Ordinance are to ameliorate environmental problems in the City, such as uncontrolled storm water runoff and non-point source water pollution, to promote public safety, as well as to improve the aesthetic quality of the City. Affidavits provided by the City support these purposes.

4.

The Plaintiffs argue that the Parking Lot Ordinance effects a taking of property without compensation in violation of the due process clause of the Fifth Amendment to the United States Constitution and a violation of the Constitution of the State of Georgia. With respect to the Fifth Amendment, the Plaintiffs contend that a physical invasion of the Plaintiffs' property has occurred under the principles established by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In the *Loretto* case, a New York statute required a landlord to permit a cable television company to install its cable television facilities upon his property. The Supreme Court held that where there is a permanent physical occupation of real property, there is a taking to the extent of that occupation. The case

before this Court does not involve a permanent physical occupation by a third party as in *Loretto*, but is instead a restriction on the use by the Plaintiffs of a small portion of their property and therefore is not controlled by *Loretto*.

5.

The Georgia Constitution has been interpreted as requiring that parties, such as the Plaintiffs, first show by clear and convincing evidence that the Parking Lot Ordinance presents a "significant detriment" and then show that the zoning is "unsubstantially related" to the public health, safety, morality and welfare. If the Plaintiffs establish both of these requirements, then the City of Atlanta would be required to justify the zoning under the factors set forth in *Guhl v. Holcomb Bridge Road Corp.*, 238 Ga. 322 (1977). In the case before this Court, a significant detriment exists since funds, in some cases substantial funds, will have to be expended in order to comply with the Parking Lot Ordinance. The Plaintiffs, however, have failed to meet the second prong of the threshold test, i.e., that the Ordinance is unsubstantially related to the public health, safety, morality and welfare. The balancing test required in *Guhl* is therefore not reached.

6.

The Plaintiffs argue that the financial burden of complying with the Parking Lot Ordinance is actually a special assessment. The Parking Lot Ordinance regulates the use of property and is not a tax levied to benefit other property to the exclusion of the Plaintiffs' property.

7.

The Plaintiffs contend that the Parking Lot Ordinance is based solely or predominantly on aesthetic considerations and therefore, has not been enacted for a public purpose. No Georgia case, however, has been cited for this proposition. *H & H Operations, Inc. v. City of Peachtree City*, 248 Ga. 500 (1981), upheld aesthetics as a justification for the enactment of an ordinance where the ordinance was rationally related to legitimate public concerns.

8.

The Plaintiffs argue that the Parking Lot Ordinance, in effect, requires the Plaintiffs to dedicate a scenic easement to the City of Atlanta. This argument restates the due process argument addressed in paragraph 4 of this Order.

9.

Finally, the Plaintiffs argue that the Parking Lot Ordinance violates the Equal Protection Clause of the United States Constitution. The Parking Lot Ordinance does apply only to certain zoning districts, only to parking lots of 30 spaces or more, and only to parking lots, not vacant lots. The affidavits submitted by the City of Atlanta justify on rational bases these classifications.

10.

The Plaintiffs' Application for an Injunction is hereby **DENIED** and Declaratory Judgment is hereby **GRANTED** to the City of Atlanta.

SO ORDERED this 3rd day of March, 1994.

/s/ Elizabeth E. Long
ELIZABETH E. LONG, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

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SUPREME COURT OF GEORGIA

Case No. S94A0975 Atlanta, December 20, 1994

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PARKING ASSOCIATION OF GEORGIA, INC., ET AL. V. CITY OF AT [sic] GEORGIA

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, C.J., Sears and Carley, JJ., dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT JR., Plaintiffs, v. CITY OF ATLANTA, GEORGIA, a political subdivision of the State of Georgia, Defendant.	CIVIL ACTION FILE NO. E-21249 (Filed Oct. 15, 1993)

COMPLAINT

COME NOW the plaintiffs and state their complaint against the defendant and respectfully show the court as follows:

COUNT I

1.

Plaintiff Parking Association of Georgia, Inc. is an association of companies managing or operating commercial surface parking lots located in the C-4, C-5, SPI-1, SPI-2, SPI-3, SPI-4 and MLK zoning districts of the City of Atlanta, Georgia.

2.

Plaintiff Capitol Outdoor Advertising, Inc. ("Capitol Outdoor") is a Delaware corporation qualified to do business in Georgia.

3.

Plaintiff Outdoor Systems, Inc. ("Outdoor Systems") is a Delaware corporation qualified to do business in Georgia.

4.

Plaintiff Morris N. Habif is an owner of a commercial surface parking lot located in the City of Atlanta, Georgia, which is effected by the Parking Lot Ordinance defined below.

5.

Plaintiff Seaborn Wright Jr. is an owner of a commercial surface parking lot located in the City of Atlanta, Georgia, which is effected by the Parking Lot Ordinance defined below.

6.

The defendant is a political subdivision of the State of Georgia located in Fulton County, Georgia, created and existing under the laws of the State of Georgia.

7.

The defendant is subject to the jurisdiction and venue of this court.

8.

The governing authority of the City of Atlanta, Georgia, has enacted an ordinance governing commercial and noncommercial surface parking lots and parking structures (hereinafter the "Parking Lot Ordinance") located in the C-4 (Central Area Commercial – Residential) zoning district, the C-5 (Central Business Support) zoning district, the SPI-1 (Central Core Special Public Interest) zoning district, the SPI-2 (North Avenue Special Public Interest) zoning district, the SPI-3 (Midtown Public Special Interest) zoning district, the SPI-4 (Art Center Special Public Interest) zoning district and the Martin Luther King, Jr. Landmark zoning district (the "Affected Zoning Districts"). The ordinance was enacted on May 18, 1992, and approved by the mayor on May 26, 1992. A true and correct certified copy of the Parking Lot Ordinance as enacted by the City of Atlanta is attached hereto as Exhibit "A".

9.

The Parking Lot Ordinance has been codified in Sections 16-14.012, 16-15.011, 16-18A.013, 16-18B.013, 16-18C.013, 16-18D.013, and 16-20C.003(18) of the Atlanta City Code. True and correct certified copies of those provisions of the Atlanta City Code are attached hereto as Exhibit "B".

10.

The Parking Lot Ordinance requires the following minimum barrier, curb and landscaping requirements in all surface parking lots with a total of thirty or more

parking spaces, whether primary or accessory in use and whether commercial or noncommercial:

(1) Barrier curbs shall be installed around the perimeter of the parking lot and around landscaped areas that are required herein, except where the perimeter abuts an adjacent building or structure and at points of ingress and egress into the facility, so as to prevent encroachment of vehicles onto adjacent property, rights-of-way and landscape areas.

(2) Barrier curbs shall be a minimum of six (6) inches in height and a minimum of eight (8) inches in width and permanent in nature. Barrier curbs shall be concrete or stone. Such curbs shall be securely installed and maintained in good condition.

(3) Where the end of a parking space abuts a landscaped area, barrier curbs may be placed in the parking space at a maximum of two (2) feet from the end of the parking space. This two-foot-wide area may have the pavement removed, and be developed as part of the required landscaped area.

(4) Surface parking lots shall have a minimum landscaped area equal to at least 10 percent of the paved area within said lot. In no case shall a parking lot owner be required to provide landscaped areas that exceed 10 percent of the paved area.

(5) A minimum of one (1) tree per eight (8) parking spaces shall be included in the required landscaped areas. For the purposes of satisfying this requirement, existing trees that are two and one-half (2.5) inches or more in caliper as measured at a height 36 inches above ground level,

shall be considered to be equivalent to one (1) or more newly planted trees on the basis of one (1) tree for each two and one-half (2.5) inches in caliper.

(6) In addition to trees, ground cover shall be provided in order to protect tree roots and to prevent erosion. Ground cover shall consist of shrubs, ivy, liriope, pine bark mulch, and other similar landscaping materials.

(7) Shrubs shall be maintained at a maximum height of two and one-half (2.5) feet, except where such shrubs are screening the parking surface from an adjacent residential use.

(8) In the event that landscaped areas are in the interior of a parking lot they shall be a minimum of six (6) feet in width and six (6) feet in length with a minimum area of 36 square feet.

(9) Continuous landscaped buffer strips shall be constructed along sidewalks and public rights-of-way where surface parking lots are adjacent to such sidewalks or public rights-of-way, except at points of ingress and egress into the facility. Such landscaped buffer strips shall be a minimum of five (5) feet in width and shall contain, in addition to ground cover, trees planted a maximum of 42.5 feet on center along the entire length.

(10) Newly planted trees shall be a minimum of two and one-half (2.5) inches in caliper as measured at a height six (6) inches above ground level; shall be a minimum of 10 feet in height; shall have a 40-foot minimum mature height and shall be drought-tolerant. Trees shall be planted a minimum of 30 inches from any

barrier curb, so as to prevent injury to trees from vehicle bumpers.

(11) Where landscaped areas are located adjacent to vehicle overhangs, the trees shall be planted in line with the side stripes between parking spaces in order to avoid injury to trees by vehicle bumpers.

(12) All landscaped areas, including trees located in the public right-of-way that are counted in the fulfillment of this requirement, shall be properly maintained in accordance with approved landscape plans. In the event that a tree or any plant material dies, it shall be replaced within six (6) months so as to meet all requirements of this section and to allow for planting in the appropriate planting season.

11.

The Parking Lot Ordinance does not provide for any compensation by the City of Atlanta to those required to expend funds required to comply with the ordinance, nor to those whose income is reduced as a result of lost parking spaces, nor to others whose businesses are affected by compliance with the ordinance.

12.

Plaintiffs Capitol Outdoor and Outdoor Systems own and lease real property located on or adjacent to surface parking lots affected by the Parking Lot Ordinance for the purpose of the erection and maintenance of outdoor advertising signs and structures. Some of the signs and

structures owned by Capitol Outdoor and Outdoor Systems have been and are being obstructed by the planting of trees and other vegetation in accordance with the requirements of the Parking Lot Ordinance.

13.

The provisions of the Parking Lot Ordinance set forth in paragraph 10 above result in a taking of or damage to a portion of each parking lot affected by the ordinance for which the owners thereof are entitled to just compensation under the Fifth Amendment to the United States Constitution, as made applicable to the City of Atlanta by the Fourteenth Amendment, and by Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

14.

The provisions of the Parking Lot Ordinance require each parking lot owner to create a permanent physical occupation through the planting of trees and vegetation on his own property, thus diminishing the number of parking spaces available for lease or hire to the public. As a result, the above-referenced provisions of the Parking Lot Ordinance effect a taking of or damage to the lot owners' and operators' property without compensation in violation of the Fifth Amendment to the United States Constitution, made applicable to the City of Atlanta through the Fourteenth Amendment, and in violation of Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

15.

The Parking Lot Ordinance, in requiring owners and operators of parking lots to plant trees and other vegetation in front of previously existing legal signs and billboards owned by plaintiffs Capitol Outdoor and Outdoor Systems, result in a taking or damage to the property of Capitol Outdoor and Outdoor Systems for which it is entitled to just compensation under the Fifth Amendment to the United States Constitution, as made applicable to the City of Atlanta by the Fourteenth Amendment, and by Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

COUNT II

16.

Plaintiffs incorporate herein by reference each of the allegations of paragraphs 1 through 10 above as if they had been restated herein.

17.

The enactment of the Parking Lot Ordinance requires the owners and operators of surface parking lots within the Affected Zoning Districts to make improvements that, while perhaps valuable to others, are useless to them.

18.

By imposing.the financial burden of complying with the Parking Lot Ordinance on the owners and operators of surface parking lots within the Affected Zoning

Districts, the ordinance indirectly imposes a special assessment against all surface parking lots located within the Affected Zoning Districts.

19.

By imposing a special assessment against surface parking lot owners and operators, the Parking Lot Ordinance imposes a financial burden on certain of the plaintiffs in substantial excess of the special benefits accruing to them and, as a result, is a taking, under the guise of taxation, of these plaintiffs' private property for public use without compensation. As a result, the Parking Lot Ordinance is violative of the Fifth Amendment to the United States Constitution, made applicable to the City of Atlanta through the Fourteenth Amendment, and Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

COUNT III

20.

Plaintiff incorporates herein by referenced [sic] each of the allegations of paragraph [sic] 1 through 10 above as if they had been restated herein.

21.

The Parking Lot Ordinance applies only to owners and operators of surface parking lots located within the Affected Zoning Districts and, within those districts, only to surface parking lots having a total of thirty or more parking spaces.

22.

There is no rational basis for excluding from the burdens of the Parking Lot Ordinance the numerous surface parking lots located within the city limits of the City of Atlanta located outside the Affected Zoning Districts.

23.

There is no rational basis for excluding from the burdens of the Parking Lot Ordinance those surface parking lots having less than thirty parking spaces while applying those burdens to all surface parking lots within the Affected Zoning Districts having a total of thirty or more parking spaces.

24.

There is no rational basis for excluding vacant lots from the requirements of the Parking Lot Ordinance, while including within the requirements commercial and noncommercial surface parking lots having a total of thirty or more parking spaces.

25.

As a result of a lack of any rational basis for the inclusion or exclusion of the areas referenced in paragraphs 21 through 24 above, the Parking Lot Ordinance is in violation of the plaintiffs' rights to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and under Article I, Section I, Paragraph II of the Constitution of the State of Georgia.

COUNT IV

26.

Plaintiffs incorporate herein by reference each of the allegations of paragraph [sic] 1 through 10 above as if they had been restated herein.

27.

As stated in the preamble to the Parking Lot Ordinance, the primary reason for the enactment of the Ordinance is the alleged aesthetic enhancement of the Affected Zoning Districts within the City of Atlanta.

28.

A zoning ordinance based solely or predominately on aesthetic considerations is invalid as a matter of law. As a result, the Parking Lot Ordinance, being based solely or predominately on aesthetic considerations, is invalid as a matter of law.

COUNT V

29.

Plaintiffs incorporate herein by reference each of the allegations of paragraph [sic] 1 through 10 above as if they had been restated herein.

30.

In order for the plaintiffs to comply with the Parking Lot Ordinance they will be required to expend substantial

private funds to accomplish what the City of Atlanta apparently believes to be an aesthetically pleasing environment. Requiring the plaintiffs to expend substantial funds to plant vegetation in their parking lots and to eliminate parking spaces is unreasonable and void as a matter of law because the requirement bears no rational relation to the public health, safety and welfare. As a result, the enactment and enforcement of the Parking Lot Ordinance exceeds the authority of the City of Atlanta.

WHEREFORE, plaintiffs pray as follows:

(a) with respect to counts I and II, that the court declare the Parking Lot Ordinance of the City of Atlanta, Georgia to be unconstitutional and void as violative of the Fifth Amendment to the United States Constitution, made applicable to the City of Atlanta through the Fourteenth Amendment, and Article I, Section III, Paragraph I of the Constitution of the State of Georgia; and that the court issue a temporary and permanent injunction preventing the defendant from enforcing the Parking Lot Ordinance against the plaintiffs.

(b) with respect to count III, that the court declare the Parking Lot Ordinance of the City of Atlanta, Georgia to be unconstitutional and void as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraph II of the Constitution of the State of Georgia; and that the court issue a temporary and permanent injunction preventing the defendant from enforcing the Parking Lot Ordinance against the plaintiffs.

(c) with respect to count IV, that the court declare the Parking Lot Ordinance of the City of Atlanta, Georgia

to be invalid as a matter of law because it is based solely or predominately on aesthetic considerations; and that the court issue a temporary and permanent injunction preventing the defendant from enforcing the Parking Lot Ordinance against the plaintiffs.

(d) with respect to count V, that the court declare the Parking Lot Ordinance of the City of Atlanta, Georgia to be invalid as a matter of law because its obligations on the plaintiffs bear no rational relation to the public health, safety and welfare; and that the court issue a temporary and permanent injunction preventing the defendant from enforcing the Parking Lot Ordinance against the plaintiffs.

(e) for attorneys fees pursuant to 42 U.S.C. § 1988, and costs of this action.

This the 15 day of October, 1993.

/s/ Mark W. Forsling
DAVID H. FLINT
State Bar No. 264600

MARK W. FORSLING
State Bar No. 270025

Attorneys for plaintiffs

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(404) 681-3450

IN THE SUPREME COURT

STATE OF GEORGIA

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,	)	
Appellants,	)	CASE NO. S94A0975
v.	)	
CITY OF ATLANTA, GEORGIA, a political subdivision of the State of Georgia,	)	
Appellee.	)	

APPELLANTS' ENUMERATION OF ERRORS

David H. Flint
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(404) 681-3450

Attorneys for Appellants

IN THE SUPREME COURT

STATE OF GEORGIA

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,	)	
Appellants,	)	CASE NO. S94A0975
v.	)	
CITY OF ATLANTA, GEORGIA, a political subdivision of the State of Georgia,	)	
Appellee.	)	

ENUMERATION OF ERRORS

COME NOW appellants and enumerate the following errors committed by the trial court:

1.

The trial court erred in holding that an ordinance which requires the expenditure of private funds for the public purpose of improving the appearance of parking lots, causes the loss of use of real property, and causes the loss of rental income does not effect a taking of or damage to property without payment of compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section I, Paragraph I, and Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

2.

The trial court erred in concluding that an ordinance enacted for the purpose of improving the aesthetic appearance of some parking lots in a small portion of the City of Atlanta which requires the expenditure of private funds for this public purpose, causes the loss of use of real property, and causes the loss of rental income does not violate the appellants' rights to substantive due process under Article I, Section I, Paragraph I of the Constitution of the State of Georgia and the Fifth and Fourteenth Amendments to the United States Constitution.

3.

The trial court erred in concluding that an ordinance establishing classifications among parking lots which confine the regulated area to a narrow corridor between the downtown and midtown areas of Atlanta while non-regulated areas of the City are used in the same manner, and which exempts unpaved lots and all parking lots with less than thirty spaces does not violate the equal protection clause under the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraph II of the Constitution of the State of Georgia.

4.

The trial court erred in holding that an ordinance requiring appellants to pay for improvements to their property which benefit only the public, and not the appellants' property, is not a taking of or damage to

appellants' property without payment of compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section III, Paragraph I of the Constitution of the State of Georgia, or a violation of appellants' rights to due process in violation of Article I, Section I, Paragraph I of the Constitution of the State of Georgia and the Fifth and Fourteenth Amendments to the United States Constitution.

5.

The trial court erred in holding that an ordinance based on aesthetics which applies affirmative duties to appellants, whose properties were previously legally conforming to all applicable zoning laws, is not a taking of or damage to appellants' property without payment of compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section III, Paragraph I of the Constitution of the State of Georgia, or a violation of appellants' rights to due process in violation of Article I, Section I, Paragraph I of the Constitution of the State of Georgia and the Fifth and Fourteenth Amendments to the United States Constitution.

This the 21st day of April, 1994.

/s/ David H. Flint
DAVID H. FLINT
State Bar No. 264600
MARK W. FORSLING
State Bar No. 270025

Attorneys for appellants

CERTIFICATE OF SERVICE

This is to certify that I have this day served appellee with a copy of appellants' enumeration of errors by depositing a copy of same in the United States first class mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

David D. Blum, Esq.
City Attorney's Office
Suite 4100
68 Mitchell Street, S.W.
Atlanta, Georgia 30335-0332

Attorney for appellee
This 21st day of April, 1994.

/s/ Mark W. Forsling
MARK W. FORSLING
Attorney for appellants

CITY OF ATLANTA

(Seal)

OFFICE OF MUNICIPAL CLERK

STATE OF GEORGIA)
) CITY OF ATLANTA
COUNTY OF FULTON)

I, Rhonda Dauphin Johson [sic], do hereby certify that I am the duly appointed **Deputy Municipal Clerk** of the City of Atlanta, Georgia, and as such am in charge of keeping the Minutes of the City Council of the said City of Atlanta. I further certify that the attached is a true and correct copy of:

AN ORDINANCE TO AMEND THE 1982 CITY OF ATLANTA ZONING ORDINANCE, AS AMENDED, SO AS TO ADOPT ADDTIONAL [sic] REGULATIONS GOVERNING COMMERCIAL AND NON-COMMERCIAL SURFACE PARKING LOTS AND PARKING STRUCTURES WHEN LOCATED IN THE C-4 (CENTRAL AREA COMMERCIAL-RESIDENTIAL) DISTRICT, THE C-5 (CENTRAL BUSINESS SUPPORT) DISTRICT, THE SPI-1 (CENTRAL CORE SPECIAL PUBLIC INTEREST) DISTRICT, THE SPI-2 (NORTH AVENUE SPECIAL PUBLIC INTEREST) DISTRICT, THE SPI-3 (MIDTOWN SPECIAL PUBLIC INTEREST) DISTRICT, THE SPI-4 (ARTS CENTER SPECIAL PUBLIC INTEREST) DISTRICT AND THE HC-20C (MARTIN LUTHER KING, JR. LANDMARK) DISTRICT AND FOR OTHER PURPOSES.

ADOPTED AS AMENDED BY COUNCIL MAY 18, 1992; APPROVED BY THE MAYOR MAY 26, 1992.

all as the same appears from the original which is of record and on file in my said office.

GIVEN under my hand and seal of office this **15th** day of **October, 1993.**

EXHIBIT A /s/ Rhonda Dauphin Johnson
Deputy Municipal Clerk

WHEREAS, said safety problems, visual intrusions, aesthetic problems, and environment problems, are contrary to the public health, safety and welfare of the citizens of the City of Atlanta; and

WHEREAS, Council has the authority, ability and obligation, pursuant to its direct constitutional powers to regulate zoning and planning and its general police powers, to insure that commercial districts are free of unsafe areas, aesthetically intrusive areas and areas that contribute to environmental problems, so as to maintain a safe, aesthetically pleasing, and healthy environment for the citizens of Atlanta; and

WHEREAS, the following minimal regulations controlling public safety, and landscape design criteria for surface parking lots in affected districts implements the above-referenced substantial governmental interest in safety, aesthetics and environmental quality and directly advances said interest by regulating, through specific standards and design criteria, the parking attendants, lighting, signage, barrier curbs and landscaping of said

surface parking lots in those districts most affected by these identified public interests; and

WHEREAS, said following regulations will minimize adverse public safety, visual, aesthetic affects [sic] and environmental problems in affected districts through implementation of security measures, and aesthetic pleasing and environmentally enhancing landscaping; and

WHEREAS, said following regulations will substantially advance the public health, safety and welfare and are necessary to effectuate sound planning in said districts;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ATLANTA, as follows:

Section 1. That Section 16-29.001 is hereby amended by adding the following new paragraphs at the end of said Section:

(33) Parking structure – a structure of one (1) story or more used for the temporary storage of vehicles whether located above or below grade.

(34) Surface parking lot – a parcel of land utilized for an at-grade temporary storage of vehicles.

(35) Parking facilities – a parking structure and/or a surface parking lot.

Section 2. That Section 16-14.003 (22) [permitted principal uses and structures in the C-4 district] is hereby deleted in its entirety and a new Section 16-14.003 (22) is hereby adopted in lieu thereof which shall read as follows:

> "Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 3. That Section 16-14.005 (2) (c) [uses permissible only by special administrative permit in the C-4 district] is hereby deleted in its entirety and new Section 16-14.005 (2) (c) is hereby adopted in lieu thereof which shall read as follows:

> "Parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-14.011 and 16-14.012."

Section 4. That a new Section 16-14.011, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance [C-4 district], is hereby adopted which shall read as shown on the attached Exhibit A.

Section 5. That a new Section 16-14.012, Surface Parking Lots Landscaping and Barrier Requirements [C-4 district], is hereby adopted which shall read as shown on the attached Exhibit B.

Section 6. That Section 16-15.003 (25) [permitted principal uses and structures in the C-5 district] is hereby deleted in its entirety and a new Section 16-15.003 (25) is hereby adopted in lieu thereof which shall read as follows:

> "Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 7. That a new 16-15.005 (2) (c) [uses permissible only by special administrative permit in the C-5 district] is hereby adopted which shall read as follows:

> "Parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-15.010 and 16-15.011."

Section 8. That a new Section 16-15.010, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements [C-5 district], is hereby adopted which shall read as shown on the attached Exhibit A.

Section 9. That a new Section 16-15.011, Surface Parking Lots Landscaping and Barrier Requirements [C-5 district], is hereby adopted which shall read as shown on the attached Exhibit B.

Section 10. That Section 16-18A.003 (22) [permitted principal uses and structures in the SPI-1 district] is hereby deleted in its entirety and a new Section 16-18A.003 (22) is hereby adopted in lieu thereof which shall read as follows:

> "Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 11. That Section 16-18A.005 (1) (d) [uses permissible only by special use permit in the SPI-1 district] is hereby deleted in its entirety and a new Section 16-18A.005 (1) (d) is hereby adopted in lieu thereof which shall read as follows:

> "Independent primary parking structures with 30 or more parking spaces when located within the parking limitation districts in accordance with Section 16-18A.012"

Section 12. That Section 16-18A.005 (2) (d) [uses permissible only be [sic] special administrative permit in the SPI-1 district] is hereby adopted which shall read as follows:

> "Independent primary parking facilities with a total of 30 or more parking spaces when located

outside the parking limitation districts in accordance with the provisions of Section 16-18A.012 and all other parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-18A.012 and 16-18A.013."

Section 13. That a new Section 16-18A.012, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements [SPI-1 district] is hereby adopted which shall read as shown on the attached Exhibit A.

Section 14. That a new Section 16-18A.013, Surface Parking Lots Landscaping and Barrier Requirements [SP-1 [sic] district] is hereby adopted which shall read as shown on the attached Exhibit B.

Section 15. That Section 16-18B.C[illegible] (20) [permitted principal uses and structures in the SPI-2 district] is hereby deleted in its entirety and a new Section 16-18B.003 (20) is hereby adopted in lieu thereof which shall read as follows:

"Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 16. That Section 16-18B.005 (1) (d) [uses [permissible by special use permit in the SPI-2 district] is hereby deleted in its entirety and a new Section 16-18B.005 (1) (d) is hereby adopted in lieu thereof which shall read as follows:

"Independent primary parking facilities with 30 or more parking spaces when located within the parking limitation districts in accordance with the provisions of Section 16-18B.012."

Section 17. That Section 16-18B.005 (2) (c) [uses permissible by special administrative permit in the SPI-2 district] is hereby adopted which shall read as follows:

"Independent primary parking facilities with a total of 30 or more parking spaces when located outside the parking limitation districts in accordance with the provisions of Section 16-18B.012 and all other parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-18B.012 and 16-18B.013."

Section 18. That a new Section 16-18B.012, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements [SPI-2 district] is hereby adopted which shall read as shown on the attached Exhibit A.

Section 19. That a new Section 16-18B.013, Surface Parking Lots Landscaping and Barrier Requirements [SPI-2 district] is hereby adopted which shall read as shown on the Attached Exhibit B.

Section 20. That Section 16-18C.003 (20) [permitted principal uses and structures in the SPI-3 district] is hereby deleted in its entirety and a new Section 16-18C.003 (20) is hereby adopted in lieu thereof which shall read as follows:

"Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 21. That Section 16-18C.005 (1) (d) [uses permitted by special use permit in the SPI-3 district] is hereby deleted in its entirety and a new Section 16-18C.005 (1)

(d) is hereby adopted in lieu thereof which shall read as follows:

> "Independent primary parking facilities with 30 or more parking spaces when located within the parking limitation districts in accordance with the provisions of Section 16-18C.012."

Section 22. That Section 16-18C.005 (2) (c) [uses permitted by special administrative permit in the SPI-3 district] is hereby adopted which shall read as follows:

> "Independent primary parking facilities with a total of 30 or more parking spaces when located outside the parking limitation districts in accordance with the provisions of Section 16-18C.012 and all other parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-18C.012 and 16-18C.013."

Section 23. That a new Section 16-18C.012, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements [SPI-3 district] is hereby adopted which shall read as shown on the attached Exhibit A.

Section 24. That a new Section 16-18C.013, Surface Parking Lots Landscaping and Barrier Requirements [SPI-3 district] is hereby adopted which shall read as shown on the attached Exhibit B.

Section 25. That Section 16-18D.003 (20) [permitted uses and structures SPI-4 district] is hereby deleted in its entirety and a new Section 16-18D.003 (20) is hereby adopted in lieu thereof which shall read as follows:

> "Parking structures and surface parking lots with fewer than 30 parking spaces."

Section 26. That Section 16-18D.005 (1) (d) [uses permitted by special use permit in the SPI-4 district] is hereby deleted in its entirety and a new Section 16-18D.005 (1) (d) is hereby adopted in lieu thereof which shall read as follows:

> "Independent primary parking facilities with 30 or more parking spaces when located within the parking limitation districts in accordance with the provisions of Section 16-18D.012."

Section 27. That Section 16-18D.005 (2) (c) [uses permitted by special administrative permit in SPI-4 district] is hereby adopted which shall read as follows:

> "Independent primary parking facilities with a total of 30 or more parking spaces when located outside the parking limitation districts in accordance with the provisions of Section 16-18D.012 and all other parking structures and surface parking lots with a total of 30 or more parking spaces in accordance with the provisions of Sections 16-18D.012 and 16-18D.013."

Section 28. That a new Section 16-18D.012, Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements [SPI-4 district] is hereby adopted which shall read as shown on the attached Exhibit A.

Section 29. That a new Section 16-18D.013, Surface Parking Lots, Landscaping and Barrier Requirements [SPI-4 district] is hereby adopted which shall read as shown on the attached Exhibit B.

Section 30. That a new Section 16-20C.003 (18) [general regulations in the MLK district] is hereby adopted which shall read as follows:

> "(18) Parking Structures and Surface Parking Lots; Parking Attendants, Security, Maintenance, Landscaping and Barrier Requirements. In that part of the Martin Luther King, Jr. Landmark District lying and being west of the I-75/85 Interstate Highway, the provisions of Sections 16-18A.012 and 16-18A.013 shall be applied to existing primary or accessory parking structures and surface parking lots and shall control the development of any new primary or accessory parking structures and surface parking lots where said structures and surface parking lots are permitted within the Martin Luther King, Jr. Landmark District. Said controls shall be applicable without regard to the designated subarea and shall be administered and enforced by the Urban Design Commission in accordance with such procedures as are established in Section 16, Chapter 20 generally, provided, however, that properties identified as being within subarea 6 shall remain governed by the regulations provided for in Section 16-20C.009."

Section 31. That all ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

A true copy,

/s/ Olivia P. Woods
Municipal Clerk,
C.M.C.

ADOPTED as amended by Council May 18, 1992
APPROVED by the Mayor May 26, 1992

EXHIBIT A

Parking Structures and Surface Parking Lots, Parking Attendants, Security and Maintenance Requirements

All surface parking lots and structures with a total of thirty (30) or more parking spaces, whether primary or accessory in use and whether commercial or non-commercial, shall have minimum requirements as follows:

(1) A parking attendant shall be present during all hours of operation at any parking-for-hire parking facility with 200 or more parking spaces. An attendant will not be required if a card operated security gate is provided or if less than fifty (50) percent of the lot is being utilized.

(2) Whenever parking rates are increased in connection with a special event, an attendant shall be present during a period beginning one (1) hour before and ending one (1) hour after said event.

(3) Lighting shall be provided throughout all parking facilities to equal a minimum of one-half (.5) foot-candle of light. A foot-candle of light is a uniformly distributed flux of one (1) lumen on a surface of one (1) square foot in area. Where applicable, public street lighting may be utilized to either partially or totally fulfill the lighting requirements; however, where such street lighting is removed it shall be the responsibility of the parking facility to independently provide these required levels of illumination.

(4) Parking facilities shall be maintained in a clean, safe, sanitary and attractive condition. Parking spaces and driving lanes shall be clearly defined and maintained as

such. Parking lots shall not be operated when any damage impairs the drivability of the parking lot.

(5) Identifying signage shall be located at the primary entrance to all park-for-hire facilities. Such signage shall consist of one (1) twenty four (24) inch by twenty four (24) inch upper sign which shall be located directly above one (1) twelve (12) inch high by twenty four (24) inch wide lower sign. Such signage shall be located at a minimum of seven (7) feet above ground level and shall be displayed such that both sign faces are visible from the street. The upper sign shall display a capital "P" which shall be a minimum of eighteen (18) inches in height. The lower sign shall display the address of the parking facility with lettering which shall be a minimum of six (6) inches in height. The upper and lower signs may be constructed as one (1) sign that shall be thirty six (36) inches in height and twenty four (24) inches in width. Sign faces shall be dark blue with white letters in a helvetica medium type face. All lettering shall be clearly legible from the street.

(6) Parking facilities operating before the effective date of this ordinance shall have twenty four (24) months to comply herewith.

EXHIBIT B

Surface Parking Lots, Landscaping and Barrier Requirements

All surface parking lots with a total of thirty (30) or more parking spaces, whether primary or accessory in use and whether commercial or non-commercial, shall have minimum barrier curb and landscaping requirements as follows:

(1) Barrier curbs shall be installed around the perimeter of the parking lot and around landscaped areas that are required herein, except where the perimeter abuts an adjacent building or structure and at points of ingress and egress into the facility, so as to prevent encroachment of vehicles onto adjacent property, rights-of-way and landscape areas.

(2) Barrier curbs shall be a minimum of six (6) inches in height and a minimum of eight (8) inches in width and permanent in nature. Barrier curbs shall be concrete or stone. Such curbs shall be securely installed and maintained in good condition.

(3) Where the end of a parking space abuts a landscaped area, barrier curbs may be placed in the parking space at a maximum of two (2) feet from the end of the parking space. This two (2) foot wide area may have the pavement removed, and be developed as part of the required landscaped area.

(4) Surface parking lots shall have a minimum landscaped area equal to at least ten percent (10%) of the paved area within said lot. In no case shall a parking lot

owner be required to provide landscaped areas that exceed ten percent (10%) of the paved area.

(5) A minimum of one (1) tree per eight (8) parking spaces shall be included in the required landscaped areas. For the purpose of satisfying this requirement, existing trees that are two and one-half (2 1/2) inches or more in caliper as measured at a height thirty six (36) inches above ground level, shall be considered to be equivalent to one (1) or more newly planted trees on the basis of one (1) tree for each two and one-half (2 1/2) inches in caliper.

(6) In addition to trees, ground cover shall be provided in order to protect tree roots and to prevent erosion. Ground cover shall consist of shrubs, ivy, liriope, pine bark mulch, and other similar landscaping materials.

(7) Shrubs shall be maintained at a maximum height of two and one-half (2 1/2) feet, except where such shrubs are screening the parking surface from an adjacent residential use.

(8) In the event that landscaped areas are in the interior of a parking lot they shall be a minimum of six (6) feet in width and six (6) feet in length with a minimum area of thirty six (36) square feet.

(9) Continuous landscaped buffer strips shall be constructed along sidewalks and public rights-of-way where surface parking lots are adjacent to such sidewalks or public rights-of-way, except at points of ingress and egress into the facility. Such landscaped buffer strips shall be a minimum of five (5) feet in width and shall contain, in addition to ground cover, trees planted a maximum of

forty-two and one-half (42.5) feet on center along the entire length.

(10) Newly planted trees shall be a minimum of two and one-half (2 1/2) inches in caliper as measured at a height six (6) inches above ground level; shall be a minimum of ten (10) feet in height; shall have a forty (40) foot minimum mature height and shall be drought-tolerant. Trees shall be planted a minimum of thirty (30) inches from any barrier curb, so as to prevent injury to trees from vehicle bumpers.

(11) Where landscaped areas are located adjacent to vehicle overhangs, the trees shall be planted in line with the side stripes between parking spaces in order to avoid injury to trees by vehicle bumpers.

(12) All landscaped areas, including trees located in the public right-of-way that are counted in the fulfillment of this requirement, shall be properly maintained in accordance with approved landscape plans. In the event that a tree or any plant material dies, it shall be replaced within six (6) months so as to meet all requirements of this section and to allow for planting in the appropriate planting season.

(13) Not withstanding [sic] subsection 4 above, existing parking lots shall not be required to reduce the number of parking spaces by more than three (3) percent, as a result of implementing these landscaping regulations.

(14) If it is determined by the Bureau of Planning that implementation of these regulations will result in the loss of parking spaces in existing lots, the Director of the Bureau of Traffic and Transportation may increase the

percentage of allowable compact car spaces from twenty-five percent (25%) up to thirty-five percent (35%) so as to minimize the loss of parking spaces.

(15) Administrative variances may be granted by the Director of the Bureau of Planning only upon making all of the following findings:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, topography, subsurface conditions, overhead structures or the existence of sufficient trees in the public right-of-way within ten (10) feet of the property line.

2. Such conditions are peculiar to the particular piece of property involved; and

3. Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the Zoning Ordinance of the City of Atlanta.

(16) Owners, lessees, or authorized agents of existing parking lots shall be required to submit a landscaping plan within twelve (12) months of the effective date of this ordinance, which illustrates the proposed application of these landscaping regulations. Within six (6) months of the receipt of said landscaping plans, the Bureau of Planning shall approve these landscaping plans or develop alternative plans which meet the requirements. Within twenty four (24) months of the effective date of this ordinance all required landscaping shall be implemented.

Supreme Court, U.S.
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No. 94-1532

In The

Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners' statement contains inaccuracies and omissions. Respondent deems the following necessary to correct these deficiencies:

1. The ordinance applies to all qualifying surface parking lots within seven designated high density zoning districts, not to a specific lot or a specific number of lots. The ordinance does not require conversion of up to ten percent of paved areas; it requires landscaped areas equal to ten percent of the paved area. The ordinance does not require loss of three percent of parking spaces; it mandates that the ten percent landscape formula not reduce the number of parking spaces in an existing lot by more than three percent. The ordinance does not require a loss in annual advertising revenue. Petitioners' figure is speculative and based primarily, if not exclusively, upon factors not mandated by this ordinance.

2. The corrections noted for question 1 also apply to question 2. In addition, the parking lot owners, like the general public, benefit from these regulations.

3. The corrections noted for question 1 also apply to question 3.

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STATEMENT OF THE CASE

Several inaccuracies and omissions exist in petitioners' Statement of the Case. Respondent deems it necessary to correct these matters as follows.

This is a facial challenge to a comprehensive zoning ordinance. The ordinance in question was adopted in May 1992, as an amendment to the City of Atlanta's Zoning Ordinance. Adoption of these amendments followed several years of study. Two studies in particular, the Downtown Parking Lot Study and the Central Area Study II, focused on crime, public health issues related to water run-off and air and water quality standards, and aesthetic considerations affecting residents and visitors in Atlanta. As a part of its comprehensive planning process, the City's planning professionals recommended legislation focusing on surface parking lots in the most critically affected areas. Following nearly a year of public comment, the Atlanta Zoning Ordinance was amended to include the regulations within seven very high density zoning districts adjacent to rapid transit stations. Owners that created new surface parking lots or elected to operate existing lots within the affected zoning districts were given two years to comply with the regulations.

Petitioners choose to focus on the portion of these regulations related to aesthetic considerations. The regulations, however, primarily address public safety and health concerns caused by the facilities regulated. The ordinance regulates parking attendants, lighting standards, maintenance, identification signs, and curb barriers. The ground coverage standards, while contributing

aesthetically, also address water run-off and ground contamination problems identified during the study period. Petitioners' characterization of the ordinance – "enacted in the name of aesthetics" – is simplistic and not supported in the record.

Petitioners' statement regarding respondent's failure to consider revenue loss is incorrect. City studies showed that any financial impact would be recovered within three years by a rate increase of between ten cents and thirty-two cents per space per day, and that further reduction in cost could be made possible by arrangement with a local non-profit organization. The ordinance itself caps the number of parking spaces lost due to implementation of the regulations at three percent. Allowable compact car spaces can be increased administratively from twenty-five to thirty-five percent. Administrative hardship variances – never utilized by petitioners – are available under the ordinance, and take into consideration factors such as size, shape, topography, subsurface conditions, overhead structures, and the existence of sufficient tree coverage.

The ordinance does not apply to property on a lot by lot or development basis. It applies to all property operated as surface parking within the seven zoning districts. The record shows that these zoning districts are those most seriously affected by the problems the regulations seek to help correct. The Georgia Supreme Court conclusion that "the affected districts have the greatest concentration of parking lots" is mandated by the record. Petitioners' statement that "lots located in most of the developed areas of the city are also exempted" is incorrect and factually unsupported. Similarly, petitioners'

statement that "sign companies will cancel their leases with the lot owners and remove billboards once they are obstructed by trees" is purely hypothetical, assuming it bears some relevance to the legal issues raised.

Finally, respondent observes that while petitioners seek to champion the cause of parking lot owners throughout Atlanta and perhaps elsewhere, these petitioners actually have ownership interests in only a few parcels. Petitioner Habif, with other unnamed partners, owns five affected locations. Petitioner Wright has two. The Parking Association of Georgia is an association purporting to represent operators or managers of parking lots affected by the ordinance. The other two petitioners are billboard advertisers that lease space for outdoor signs. Petitioners' claimed value loss for advertising assumes immediate and total tree obstruction and one hundred percent lease cancellation, a situation that does not exist. Similarly, the total revenue costs petitioners associate with these regulations assumes zero current compliance – which is far from the case – and reflects costs for all affected lots, the vast majority of which are not owned by these petitioners.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH EXISTING TAKINGS JURISPRUDENCE

Petitioners contend the Supreme Court of Georgia misapplied *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Petitioners

incorrectly attempt to distinguish these decisions, however, and fail to acknowledge other direct precedent. A proper takings analysis shows that the decision below was a routine application of this Court's takings jurisprudence.

The test for a facial Fifth Amendment regulatory takings challenge is very well established. It was articulated in *Agins, supra,* and has been re-articulated by this Court on numerous occasions: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, *see Nectow v. Cambridge,* 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, *see Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138 n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978)." *Agins, supra,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

This petition presents a facial challenge to zoning regulations that apply to all qualifying property within seven specified zoning districts. The case involves no development permit and no conditional permit. The Georgia Supreme Court determined that both prongs of the *Agins* test were satisfied. The regulations plainly advance legitimate governmental interests in public safety, public health, and aesthetics. Each of these interests, and the means chosen to address them, are well established and hardly unique. Imposition of the regulations do not even arguably deny petitioners economically viable use of their property. They may continue to utilize their land for parking purposes, or they may re-utilize their land for any other allowed purpose. The cost of compliance, even assuming petitioners' inflated figures,

is far less than value loss resulting from regulations approved in numerous decisions previously before this Court, including *Agins, supra.* The Georgia Supreme Court properly ruled that these regulations do not offend the Fifth Amendment.

Given the clarity of law on this point, petitioners understandably seek to muddy the waters. They turn to *Dolan, supra,* and argue not for an extension of its reach, but for the simple proposition that *Dolan* was not applied, or perhaps incorrectly applied, to the facts of this case. Petitioners' attempt to apply *Dolan* ignores the obvious and employs an interpretation that entirely misses the point of the decision.

Petitioners quote but fail to explain the portion of the *Dolan* opinion that would result in denial of their petition. Distinguishing cases such as *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and *Agins, supra,* this Court stated:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, supra, ___ U.S. at ___, 114 S.Ct. at 2316.

Unlike *Dolan*, the regulations here are legislative determinations classifying entire areas of the city. Petitioners' statement to the contrary (petition at 13) is factually incorrect. No adjudicative decisions or conditions exist. In addition, no deed or title transfer of any kind is involved. Parking lot owners retain title, retain the ability to exclude others, and retain all other elements of the bundle of rights associated with property ownership. The regulations are constitutionally indistinguishable from landscaped buffer requirements and zoning setbacks routinely utilized throughout this country since *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). Each owner's utilization of the parcel as a whole is unaffected, if not enhanced, by these regulations. *See, e.g., Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Concrete Pipe and Products v. Construction Laborers Pension Trust*, ___ U.S. ___, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Assuming application of *Dolan* to the facts presented by this petition were appropriate or even possible, respondent would observe that petitioners' analysis of the required nexus is wide of the mark. Petitioners appear to believe that the "nexus" discussed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan* refers to a connection between the cost of compliance and the benefit to the landowner. (Petition at 13.) Those cases, however, explore the connection between the governmental interest behind the regulation and the condition attached to a redevelopment permit issued pursuant thereto. In *Nollan*, the lateral beach easement condition was found to be wholly unrelated to the public purpose supporting restrictions

on new house construction. In *Dolan*, taking title through an easement was not sufficiently related to flood control since a private greenway would have accomplished the same result. In neither case, nor in any other, has the analysis turned on the cost of compliance compared to the benefit to the landowner. Indeed, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), discarded this kind of cost/benefit takings analysis in the nuisance context. While it is difficult to rationally correlate *Dolan* to the petition at bar due to its inapplicability, it is very clear, and petitioners do not dispute, that the regulations at bar are directly and precisely correlated to the public purpose behind them. Moreover, presumably out of an abundance of caution, the Georgia Supreme Court decided that any required rough proportionality had been amply demonstrated by the City. Petitioners' focus on a cost/benefit analysis misapplies this Court's decisions in this regard as well as the findings below, which are amply supported in the record.

The decision below routinely and properly applied well established law to the facts. This matter does not involve an important question of unsettled federal law or any conflict with applicable decisions from this Court. Accordingly, the petition for a writ of certiorari should be denied.

II. THERE IS NO FIFTH AMENDMENT SPECIAL ASSESSMENT ANALYSIS

Whatever gray area may remain in the difficult field of regulatory takings, one issue no longer subject to

debate is that governmental regulations that advance legitimate state interests may lower property values or increase operating costs without violating the Fifth Amendment. *Agins, supra; Penn Central, supra; Gorieb, supra; Keystone, supra.* Skipping back some nine decades, petitioners cite to two non-zoning tax cases, contending that they create a Fifth Amendment "special assessment" rule that decades of takings jurisprudence have somehow neglected.

Perhaps the simplest response to petitioners' claim, in addition to the clarity of intervening case law to the contrary, is to observe that the linchpin of their claim – that these regulations are useless and of no benefit or applicability to them – is myopic in the extreme. First, it is petitioners' use of land that makes these regulations necessary.[1] Crime against property and persons, parking lot contamination of water and air, unchecked water run-off, unsafe means of ingress and egress, and vast aesthetic intrusions all are very real and well documented problems in Atlanta. These regulations directly address those problems. Second, the reciprocity of advantage supporting all zoning regulations is equally at play here. Petitioners enjoy a strong market for use of land as surface parking only because residents and visitors choose to frequent these areas of the city. These regulations, *inter alia,* will help to maintain and enhance visitation and use

[1] Petitioners' statement in the takings context that respondent does not contend these lots disproportionally contribute to unsightly or unhealthy areas (petition at 15) could not be further from the truth. The ordinance itself states plainly that these lots are the very reason for these regulations. (Petition at 34a-35a).

within these districts. Like the side yard setback that was argued to be of no value to the petitioner in *Gorieb, supra,* and the preservation regulations that were said to constitute highly negative value to the owners of Grand Central Terminal in *Penn Central, supra,* the safety and landscaping features of the challenged regulations provide a reciprocity of advantage that is highly valuable to these petitioners, whether or not they recognize this point. Construction of a new legal label called a "special assessment" cannot mask the fact that this legal issue was decided contrary to petitioners' position when the first zoning cases were decided *circa* 1926. The point was clearly restated in *Penn Central, supra:*

> In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the City in addition to the Terminal . . . Unless we are to reject the judgment of the New York City Council that preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole – which we are unwilling to do – we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless, appellants believe they are more burdened than benefitted by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid,* and *Goldblatt.*

438 U.S. at 134, 135, 98 S.Ct. at 2664, 2665.

Like the observations this Court directed to the appellants in *Yee v. City of Escondido,* 503 U.S. 519, 112

S.Ct. 1522, 118 L.Ed.2d 153 (1992), the regulations in question here do not require petitioners to use their land for parking purposes; but as long as they do, they are subject to zoning laws regulating that particular use even if they suffer financially in doing so. Building codes, fire safety codes, and a myriad of similar governmental regulations have financial affects on property owners identical to those at bar. Petitioners' special assessment argument ignores decades of takings jurisprudence upholding these kinds of regulations. Certiorari on this ground is not warranted.

III. THERE IS NO EQUAL PROTECTION VIOLATION

The regulations at bar apply within those high density zoning districts most impacted by the problems they address. They apply to surface parking lots that are paved and contain over thirty spaces because those lots create a greater negative impact. These are the findings of the trial court and Georgia Supreme Court, and they are well supported by the record. Such distinctions clearly are rational. Further, as stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), in citing from *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966):

> [W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that a legislature need not 'strike at all evils at the same time,' *Semler v. Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.

427 U.S. at 305, 96 S.Ct. at 2517-18.

Atlanta's approach in addressing the most seriously affected areas of the City does not violate the Equal Protection Clause. Certainly this claim does not merit review by this Court.

CONCLUSION

Regulatory takings law is complex, and there is little doubt that unresolved issues remain. This petition, however, presents no such difficulty. It attempts to construct a regulatory takings claim by ignoring that body of current takings law that does apply, while inappropriately utilizing cases that do not. The petition presents no significant federal question not already clearly resolved, and the requirements for a writ of certiorari have not been satisfied. The petition, accordingly, should be denied.

This the 12th day of April, 1995.

Respectfully submitted,

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PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL PARKING ASSOCIATION IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

National Parking Association, Inc. (hereinafter "NPA"), through its counsel and pursuant to Sup. Ct. R. 37, and with the written consent of the parties to this matter which is being filed simultaneously herewith, hereby submits this brief in support of petitioners' Petition for Writ of Certiorari in the above-captioned case (hereinafter the "Petition").

INTEREST OF THE NATIONAL PARKING ASSOCIATION

A. Statement of Facts

The facts of this case are described fully in the Petition. Petition at pp. 3-5. Accordingly, for the sake of brevity, NPA will discuss only those facts which are most relevant to the issues addressed in its argument in support of the Petition.

On May 18, 1992, the respondent enacted an ordinance (hereinafter the "Ordinance") applying retroactively to commercial and noncommercial surface parking lots located in seven downtown and midtown zoning districts in Atlanta, Georgia (hereinafter the "Affected Zoning Districts"). The Ordinance requires the owners of the affected lots to install barrier curbs around the perimeters of the lots and to create landscaped areas in the lots equal to at least ten percent of the paved area. The landscaped areas must include one tree per eight parking spaces and shrubs and ground cover between trees. It provides minimum size requirements for the trees and mandates continued maintenance of the landscaped areas at the owners' sole expense. In fact, all expenses of compliance, including the initial expense and long term maintenance, must be borne by the owners of the affected lots. *See* Petition Appendix at pp. 45a-48a.

The Ordinance applies to an estimated 350 parking lots. Compliance will cost private landowners about

$12,500 per lot, meaning that the cost of compliance for the affected lots will total approximately $4,375,000. Commercial parking lot owners will also lose income from parking fees due to a diminution in parking spaces caused by compliance. Further, many parking lot operators will lose the rental income from advertising signs located on the properties, because the sign companies will cancel their leases with the lot owners and remove billboards once they are obstructed by the trees required to be planted. The amount of the lost rental income will be substantial. Petition at pp. 4-5.

The Ordinance does not provide for payment of compensation by the City of Atlanta to those required to expend funds to comply, nor to those whose income is reduced as a result of lost parking spaces and advertising signs.

B. Relevant History of Proceedings

The petitioners have sought review of a judgment issued by the Supreme Court of Georgia on November 28, 1994. *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994). In a divided opinion, the Georgia Supreme Court ruled, *inter alia*, that the Ordinance did not violate the Fifth or Fourteenth Amendments to the United States Constitution. With respect to the Fifth Amendment, the court applied a balancing test and reasoned that the petitioners failed to present clear and convincing evidence that the Ordinance was a significant detriment to them or that the Ordinance is unsubstantially related to the public health, safety, morality and welfare. The court also held that the means adopted by the Ordinance had a real and substantial relation to the goals to be obtained.

Concerning the Fourteenth Amendment claims, the court held that the Ordinance did not constitute an unconstitutional denial of equal protection because it

rationally differentiated between the larger and smaller parking lots and between affected and unaffected zoning districts.

C. NPA's Interest

NPA is a non-profit organization which has served the parking industry since 1951. It represents more than 1,000 members from every facet of the industry, including private commercial parking operators, planners, designers and owners of parking facilities, suppliers of products and services to the industry, governmental, institutional and non-profit parking administrators, and parking industry consultants. Its current members are located in 46 of the 50 states, the District of Columbia, Puerto Rico and Guam.

The vast majority of the facilities operated by NPA-member parking operators are surface parking lots. Nearly all of these lots have more than thirty spaces, and most of them are located in urban areas which have zoning ordinances.

The Ordinance raises issues of major concern to NPA and its members, not only those who operate surface parking lots in the City of Atlanta, but also those who operate facilities throughout the United States and its territories. The requirement that operators improve, landscape and maintain their lots at significant expense and loss of revenue, without compensation, in the manner required by the Ordinance, or in similar a manner by other municipalities, poses a direct threat to the economic viability of many NPA members, without advancing a legitimate government interest in a constitutional manner. Indeed, NPA is concerned that, if allowed to stand, the Atlanta Ordinance will encourage other municipalities throughout the United States to pass legislation which unfairly requires parking lot owners to bear the cost of aesthetically improving urban centers, a cost

which rightfully should be borne by the public. It should also be noted that some municipalities have ordinances requiring surface parking lots to have a certain number of spaces. If such municipalities also pass legislation similar to the Ordinance which requires the conversion of parking spaces to landscaped areas, parking lot owners could be placed in a position where it would be impossible to operate their lots in compliance with existing laws. It is for these primary reasons that NPA has submitted this brief in support of the Petition.

SUMMARY OF ARGUMENT

The Supreme Court of Georgia erroneously concluded that the Ordinance complies with the Fifth Amendment under the standard discussed in *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), because, *inter alia*, in that case the zoning ordinance was enacted prior to the development of the property, and here the Ordinance applies to existing valid uses of the property. In fact, the Ordinance constitutes an unconstitutional taking under the "rough proportionality" test used by the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), because the conditions imposed on the affected parking lot owners are grossly disproportionate compared to the impact of the parking lots.

The Ordinance is also unconstitutional because in requiring the dedication of a significant portion of the parking lots to landscaped areas for public enjoyment, it is tantamount to an unconstitutional "physical invasion" under the holdings in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

Furthermore, the Ordinance constitutes unconstitutional reverse spot zoning, as defined by the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978) and violates petitioners' rights to substantive due process. The Ordinance arbitrarily imposes restrictions and severe financial burdens on the petitioners' parking lots.

Finally, the Ordinance unconstitutionally applies to existing parking lots which were legally zoned and permitted prior to its enactment. Because the Ordinance is designed primarily to enhance the aesthetics of the Affected Zoning Districts, no compelling reason exists to implement it immediately with respect to existing parking lots.

ARGUMENT

A. The Supreme Court of Georgia's Reliance on *Agins v. Tiburon* is Misplaced.

In holding that the Ordinance was valid under the Fifth Amendment, the Supreme Court of Georgia relied upon *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), stating that the Ordinance "advances legitimate governmental interests and leaves the plaintiffs with an economically viable use in their property." *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 766 n. 3, 450 S.E.2d 200, 203 n. 3 (1994).

The appellants in *Agins* acquired five acres of unimproved land in Tiburon, California for residential development. Before they began to develop the property, the city passed two ordinances which modified existing zoning requirements by placing the property in a zone permitting the construction of between one and five single-family houses on the five-acre tract. Rather than seeking approval for development of their land under these zoning ordinances, the appellants filed suit contending that

the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments.

This Court held that the zoning ordinance did not effect a taking without just compensation. It concluded that application of a general zoning law to a particular property constitutes a taking "if the ordinance does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." 447 U.S. at 260, 100 S. Ct. at 2141, 65 L.Ed.2d at 112 (citations omitted). Applying this analysis, the *Agins* Court concluded that the appellants "will share with other owners the benefits and burdens of the City's exercise of its police power" and that the "zoning ordinances benefit the appellants as well as the public by serving the City's interest in assuring careful and orderly development of residential property with provision for open space areas." 447 U.S. at 262, 100 S. Ct. at 2142, 65 L.Ed.2d at 113.

The Georgia Supreme Court's reliance on *Agins* is misplaced. In *Agins*, the city modified zoning regulations *before* the appellants had commenced development of their property. Indeed, this Court noted that there was "no concrete controversy regarding the application of the specific zoning provisions." 447 U.S. at 260, 100 S. Ct. at 2141, 65 L.Ed.2d at 111. In contrast, by enacting the Ordinance at issue in this case, the City of Atlanta did not change the zoning regulations applicable to the petitioners' property as they relate to future development. Instead, it required the petitioners, who were complying with existing zoning requirements, to take costly measures in order to continue to operate pre-existing businesses on their properties.

Moreover, the Ordinance requires the petitioners to forego substantial income on a permanent basis in order to comply. There was no allegation in *Agins* that the appellants were forced to give up guaranteed income that

would result from the use of their property. In essence, rather than being a statute requiring the preservation of open space, the Ordinance in this case retroactively requires the creation of open space through the extraction of the value of improved property at the petitioners' sole expense. Finally, the Ordinance does not benefit the petitioners as well as the public in the same manner as the zoning ordinances at issues in *Agins*. Whereas in *Agins* the appellants could prospectively alter their proposed development to comply with the open space requirements and perhaps reap some benefit from the development which was mandated, here the petitioners are being forced retroactively to convert currently valid income-producing property for public enjoyment purposes, without any measurable benefit to them.

B. The Decision of the Supreme Court of Georgia Upholding the Ordinance Is In Conflict With *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*.

The Ordinance under consideration is more closely compared to the ordinance reviewed by this Court in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994). In *Dolan* the owner of a plumbing and electric supply store applied to the City of Tigard, Oregon, for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store and paving a parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, the owner proposed to build an additional structure on the northeast side of the site for complementary businesses, and to provide more parking. The city planning commission granted the owner's permit application subject to the requirement that she dedicate sufficient open-land area for greenway adjoining and within the floodplain, including portions at a suitable

elevation for the construction of a pedestrian/bicycle pathway within the floodplain. The dedication required by that condition encompassed approximately 7,000 square feet, or roughly ten percent of the property. The plaintiff contended that the dedication requirement violated her rights under the Fifth and Fourteenth Amendments.

The *Dolan* Court considered the "essential nexus" test discussed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, this Court considered whether the California Coastal Commission could constitutionally impose as a condition to approval of a rebuilding permit a requirement that the applicants provide lateral access to the public to pass their beachfront property. The Court held that no nexus existed between the government's interest in visual access to the ocean from the roadway and a permit condition requiring lateral public access along the applicants' beachfront lot. Thus, the Court concluded that the exaction of the easement without compensation violated the applicants' Fifth Amendment rights. 483 U.S. at 837, 107 S. Ct. at 3148, 97 L.Ed.2d at 689.

Significantly, in analyzing the owner's claims in *Dolan*, the Court also distinguished *Agins*, *supra*, and similar cases as follows:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioners' application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held the governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

___ U.S. at ___, 114 S. Ct. at 2316-17, 129 L.Ed.2d at 316. (citations omitted).

For similar reasons, this case is distinguishable from the rezoning cases represented by *Agins* and its progeny. The Ordinance is not a legislative determination classifying an entire area of Atlanta. Instead, it affects only a narrow corridor of the city adjacent to the business district's main thoroughfare, and only a certain type of surface parking lot. More importantly, the Ordinance does much more than impose conditions limiting the petitioners' uses of their parking lots. Like the affirmative obligation to grant an easement placed on the owner in *Dolan*, the Ordinance challenged here requires the petitioners to take costly affirmative steps as a condition to the continued operation of their businesses. The result is that the Ordinance imposes an "unconstitutional condition" under *Dolan* – the exaction of money and loss of income from the petitioners in exchange for a public improvement not benefitting the petitioners in any measurable way.

In *Nollan* the Court held that under the Fifth Amendment, an essential "nexus" must exist between "the legitimate state interests" and the condition exacted by a city. 483 U.S. at 837, 107 S. Ct. at 3148, 97 L.Ed.2d at 689. It was not until the Court considered the issues presented in *Dolan*, however, that it determined the "degree of connection between the exactions and the projected impact of the proposed development." ___ U.S. at ___, 114 S. Ct. at

2317, 129 L.Ed.2d at 317. After discussing various tests being used by various state courts, this Court developed a "rough proportionality" test requiring that a "city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." ___ U.S. at ___, 114 S. Ct. at 2319-20, 129 L.Ed.2d at 320. The Court then considered the facts before it and concluded that "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." ___ U.S. at ___, 114 S. Ct. at 2321, 129 L.Ed.2d at 322. The Court reasoned that the city wanted to impose a permanent recreational easement on the owner's property, which would eviscerate her right to exclude the public. With respect to the bicycle pathway, the Court found that the city had failed to show how the additional number of vehicles and bicycle trips generated by the development reasonably related to the city's requirement for dedication of the pathway.

Applying *Nollan* and *Dolan* to this case, the Fifth Amendment has been violated because the Ordinance's exaction – the requirement that parking lot owners improve and landscape their properties at their own expense as a condition to remaining in business – is not "roughly proportional" to the "projected impact" of a "proposed development." There is no "proposed development," because the petitioners' parking lots are already developed and operating in a manner which is consistent with applicable zoning requirements. In this sense, there is no "projected impact" for the Court to weigh against the requirements of the Ordinance. It therefore follows that the direct and substantial financial burdens imposed on the petitioners are grossly disproportionate when compared to the aesthetic impact the parking lots have on the Affected Zoning Districts.

The dissenting justices in the decision below in this case properly recognized the application of *Nollan* and *Dolan* to the Ordinance, stating as follows:

> Extractions for the public benefit are generally upheld if the two requirements are met: First, that the extraction is closely related to a particular problem generated by the owner's use of his land, 1 Ziegler at § 6.10[1], [6][c]; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-840, 107 S. Ct. 3141, 3147-3150, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994); and second, that the extraction represents the property owner's proportion of the particular problem, 1 Ziegler at § 6.10[1], [6][c]; *Nollan*, 483 U.S. at n. 4, 835-36, 107 S. Ct. at n. 4, 3147-48; *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2319, 129 L.Ed.2d at 320. A host of courts have applied these standards both before and after *Nollan*. *See* 1 Ziegler, § 6.10. A significant feature of the benefit extraction analysis is that an extraction may constitute a taking under it even though it would not under the "economically viable use" or "significant detriment" test. *See* 1 Ziegler, § 6-10[1]; *Dolan*, at ___, 114 S. Ct. at 2136, n. 6, 129 L.Ed.2d at 316, n. 6.

264 Ga. at 768, 450 S.E.2d at 204 (footnotes omitted). Thus, the dissent understood that a taking has occurred through the enforcement of the Ordinance even though no actual physical governmental invasion of the petitioners' property has occurred.

In passing the Ordinance, the respondent did not contend that the petitioners disproportionately contributed to an unsightly or unhealthy downtown business district by constructing and operating their parking lots. Indeed, the petitioners' businesses were built and are being operated pursuant to the respondent's own building and zoning codes. Nevertheless, the respondent has

attempted to require the petitioners to bear the entire expense of making the city more aesthetically pleasing by mandating the planting of trees and vegetation in spite of the Fifth Amendment's purpose "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835 n. 4., 107 S. Ct. at 3148 n. 4, 97 L.Ed.2d at 688 n. 4.

As discussed above, in *Dolan* the Court turned to representative state court decisions to determine if the city's findings were sufficient to justify the conditions imposed on the owner's building permit. For similar reasons, the Court should consider representative decisions from state courts and at least one federal court which have found ordinances and statutes requiring the expenditure of private funds or the dedication of the use of private property in similar settings to be unconstitutional. *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (construing Cable Communications Policy Act as authorizing cable franchise operator to construct cable system on private property regardless of presence of any compatible easements would violate takings clause of Fifth Amendment); *Judlo, Inc. v. Vons Companies, Inc.*, 211 Cal. App. 3d 1020, 259 Cal. Rptr. 624 (4th Dist. 1989) (an injunction entered by a state court allowing a newspaper publisher to place its newsracks in front of a grocery store without the owner's consent is an unconstitutional taking of the grocer's private property under the Fifth and Fourteenth Amendments); *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984) (county ordinance requiring developers to reserve right-of-way in subdivision for proposed state road was unconstitutional taking of developer's property without compensation); *Rochester Telephone Corporation v. Village of Fairport*, 84 A.D.2d 455, 446 N.Y.S.2d 823 (4th Dept. 1982) (requiring a public utility to pay to place its transmission facilities underground for aesthetic

purposes was a taking which required compensation); *Redevelopment Authority of the City of Oil City v. Woodring*, 498 Pa. 180, 445 A.2d 724 (1982) (requiring a private property owner to expend her own funds to relocate electrical connections in order to facilitate and the placement of utility lines underground was a taking); and *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) (ordinance requiring, *inter alia*, private landowners to maintain a ten-foot open space perimeter near Williamsburg, Virginia, held violative of the takings clause of the Virginia Constitution).

C. The Ordinance is Tantamount to a "Physical Invasion" of Petitioners' Property and is Unconstitutional Under *Lucas v. South Carolina Coastal Council* and *Loretto v. Teleprompter Manhattan CATV Corp.*

Two United States Supreme Court decisions compel the conclusion that an uncompensated taking has occurred by the enactment and enforcement of the Ordinance. These are *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

In *Lucas*, the petitioner purchased two residential lots on the Isle of Palms, South Carolina, where he intended to build a single-family home on each lot. Two years later, South Carolina enacted the Beachfront Management Act, which prohibited the construction of occupiable improvements in certain beachfront areas. The Act had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. Lucas brought suit, alleging the Act deprived him of all economically viable use of the two parcels of property, thereby effecting a taking without just compensation.

In analyzing Lucas' takings claim, the Court identified two discrete categories of regulatory action which

are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." ___ U.S. ___, 112 S. Ct. at 2893, 120 L.Ed.2d at 812-813. The first category includes challenges to any regulation that results in a "physical invasion" of the owner's property. ___ U.S. ___, 112 S. Ct. at 2893, 120 L.Ed.2d at 812. In this category, a regulation that compels a property owner to suffer a "physical invasion" or "occupation" of his or her property is compensable no matter how weighty the public purpose behind it or how minute the intrusion. *Id.* The second category includes any challenge where a landowner proves a regulation "denies all economically beneficial or productive use of land." *Id.* The Court labeled this category a "total taking." ___ U.S. ___, 112 S. Ct. at 2901, 120 L.Ed.2d at 822.

If a regulation results in either a "physical invasion" or a "total taking," the owner has suffered a taking *per se* and is entitled to just compensation under the Fifth Amendment regardless of the public interest advanced in support of the restraint, unless the State can meet a rebuttal test. Under the rebuttal test, the state can avoid paying compensation only by identifying "background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found." ___ U.S. ___, 112 S. Ct. at 2901-2902, 120 L.Ed.2d at 823. In other words, the state must show the proscribed use interests were not part of the owner's title to begin with. ___ U.S. ___, 112 S. Ct. at 2899, 120 L.Ed.2d at 820.

The Supreme Court's holding in *Lucas* is applicable to this case because under the analysis in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1992), the respondent's enforcement of the Ordinance is the equivalent of a "physical invasion" of the petitioners' property. In *Loretto*, the Supreme Court reviewed a New York statute which required a landlord to permit a cable television company to install

its cable television facilities upon his property and prevented the landlord from demanding payment from the company in excess of the amount determined to be reasonable by a state commission. The landlord brought a class action for damages and injunctive relief, alleging that installation of cables by certain cable television companies insofar as those companies relied on the New York statute constituted a taking without just compensation.

This Court agreed, holding that when the character of the governmental action is a permanent physical occupation of real property there is a taking to the extent of the occupation without regard to whether the action achieves an important benefit or has only minimal economic impact on the owner. The Court reasoned that to the extent the government permanently occupies physical property, it effectively destroys an owner's right to possess, use, and dispose of his property, and concluded that the constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Expressly discarded was the argument of the City of New York that the invasion before it should be treated differently because it was not an actual invasion by the government. "A permanent physical occupation authorized by state law is a taking without regard to whether the state, or instead a party authorized by the state, is the occupant." 458 U.S. at 433 n. 9, 102 S. Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9.

The Ordinance under consideration here admittedly does not authorize a third party to plant trees and vegetation and install barrier curbs on the owners' parking lots. It does, however, require the owners themselves to take these actions solely for public uses in favor of income-producing uses of their property. Viewed in this manner, the Ordinance is similar to the statute found unconstitutional in *Loretto*. It requires the lot owners themselves to cause a permanent physical occupation of their own property by the planting of trees and vegetation and the

erection of barriers at their own expense. Thus, the Ordinance here is even more burdensome than the ordinance stricken in *Loretto* because while the landlord in *Loretto* was required to allow others to install cable in his building, he was not required to pay for the cable installation out of his own pocket.

The Ordinance is violative of the takings clause of the Fifth Amendment because it compels the owners of parking lots to suffer what is in essence a physical invasion of their property at the government's insistence and it provides for no compensation for the substantial outlay of funds for improvements and the loss of revenue suffered.

D. The Ordinance Constitutes Unconstitutional Reverse Spot Zoning And Violates Petitioners' Rights to Substantive Due Process.

The application of the Ordinance to the covered parking lots in the Affected Zoning Districts amounts to unconstitutional reverse spot zoning. This type of zoning has been defined by this Court as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than neighboring ones." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 132, 98 S. Ct. 2646, 2663, 57 L.Ed.2d 631, 653 (1978), *citing* 2 A. Rathkopf, *The Law of Zoning and Planning*, 26-4 and n. 6 (4th ed. 1978). Although the Court has defined "reverse spot zoning," it has not applied the concept in a case similar to this one.

The enactment of the Ordinance constitutes reverse spot zoning as defined in *Penn Central* because it arbitrarily imposes restrictions and severe financial burdens on surface parking lots with 30 or more spaces within the Affected Zoning Districts, while excluding lots with fewer than 30 spaces within such districts, and all other lots outside of the districts, to the economic detriment of the owners of covered lots.

In addition to discriminatorily singling out parking lots of a certain size only in a certain location, the Ordinance violates the petitioners' substantive due process rights under the Fourteenth Amendment. For example, in *Guimont v. Clarke*, 121 Wash.2d 586, 854 P.2d 1 (1993), the state statute challenged, the Mobile Home Relocation Assistance Act, required the owners of mobile home parks to contribute money towards the relocation costs of their tenants when the owners' mobile home parks were closed. Noting that *Lucas, supra*, had reordered prior Fifth Amendment analysis, the court first considered whether fundamental attributes of ownership were impaired through "physical invasions" or "total takings," without engaging in any harm-versus-benefit analysis or examining the legitimacy of the governmental interest. 121 Wash. 2d at 600, 854 P.2d at 9.

The *Clarke* court concluded that the act under consideration did not rise to the level of a physical invasion requiring *per se* compensation under *Lucas* because it did not force park owners to allow others to occupy their land. This was so because unlike the case before this Court (i) the owners had voluntarily rented space to their tenants and (ii) the act itself did not compel the park owners to continue this relationship. However, the court struck the ordinance as violative of the Fourteenth Amendment's substantive due process provision, concluding that the ordinance was unreasonable because (i) it was unduly oppressive; (ii) the costs imposed on park owners were substantial; (iii) the act's passage was unanticipated at the time the owners' mobile home parks were opened; and (iv) it was permanent in nature. 121 Wash.2d at 611-12, 854 P.2d at 16-17.

Like the statute stricken in *Clarke*, the Ordinance here is unduly oppressive; it imposes substantial financial burdens on the petitioners; it was unanticipated by the petitioners when they entered the parking lot business; and it is permanent in nature. These effects of the Ordinance

render it violative of the petitioners' rights to substantive due process under the Fourteenth Amendment.

E. The Ordinance Unconstitutionally Applies to Previously Existing Facilities.

The Ordinance is applicable to previously existing parking lots in the Affected Zoning Districts. The owners of parking lots that were legally existing and validly permitted prior to the enactment of the Ordinance are required to dig up portions of their lots to install trees, shrubs and barriers curbs, all at their own expense. No existing affected lots were exempted from these requirements. The failure of the Ordinance to exempt existing parking lots violates the petitioners' rights to substantive due process and effects an unconstitutional taking without compensation. This rule has been explained as follows:

> Generally speaking, a use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by the ordinance, where it is a lawful use of property, is not a public nuisance, or harmful to the public health, safety, morals or welfare. . . . An attempt to eliminate nonconforming uses by enforcement of the penal provisions of zoning regulations is unlawful and invalid.
>
> If, when a zoning ordinance was adopted, premises were used for a nonconforming use, the owner or user has a right to continue that use. A zoning ordinance may not operate retroactively to deprive a property owner of previously vested rights; that is to say, a zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance. A subsequent zoning ordinance cannot divest rights acquired by a property owner under a prior zoning ordinance.

8A E. McQuillin, *The Law of Municipal Corporations*, § 25.181 at p. 11 (3rd ed. rev. 1994) (footnotes omitted).

Furthermore, a regulation enacted merely to enhance the aesthetics of a community does not provide a compelling reason for immediate implementation with respect to existing structures or uses. This rule was explained in *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977) as follows:

> In contrast to a safety-motivated exercise of the police power, *a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses.* True, the public will benefit from a more aesthetically beautiful community, but absent the urgency present in a safety-motivated regulation, the immediate benefit gained does not outweigh the loss suffered by those individuals adversely affected. As always, an exercise of the police power must be reasonable.

373 N.E.2d at 261 (emphasis added) (citations omitted).

The expenditure of over $4,000,000 will be required in order to comply with the Ordinance, and a permanent loss of parking spaces available for lease will be incurred. The Constitution does not permit a city to enact a statute such as the Ordinance which causes such significant detriment to the owners of private property without excepting existing valid uses from the application of the Ordinance.

CONCLUSION

The Court should grant petitioners' Petition pursuant to Sup. Ct. R. 10.1(c) because the Supreme Court of Georgia has rendered an important decision which in part is in conflict with controlling decisions of this Court, and which otherwise presents important questions of federal law which have not, but should be, settled by this Court.

For these reasons, amicus curiae NPA respectfully requests that the petition for writ of certiorari be granted.

This is the 17th day of April, 1995.

Respectfully submitted,

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No. 94-1532

In The

Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

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CITY OF ATLANTA, GEORGIA,

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Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITIONERS' REPLY BRIEF

I. Petitioners' Reply To Respondent's Statement Of The Case

In its statement of the case, the respondent contends that the petitioners have mischaracterized the challenged ordinance as being enacted in the name of aesthetics, contending that such a characterization is not supported in the record. To the contrary, the ordinance itself states that its purpose is to "minimize adverse public safety, visual, aesthetic affects and environmental problems in affected districts through implementation of security

measures, and aesthetic pleasing and environmentally enhancing landscaping." Appendix, p. 35a. The security measures contained in the ordinance regulating parking attendants and lighting standards are not in issue in this case. The landscaping requirements which were enacted in direct response to the city's concern for "aesthetic pleasing and environmentally enhancing landscaping" are in issue. Thus, contrary to the respondent's contention, the ordinance was indeed enacted in the name of aesthetics.

The respondent next contends that its studies have shown that any adverse financial impact of the ordinance "would be recovered within three years" by a parking rate increase. The record does not support this statement. The statement in the record with respect to this issue is that "the financial impact *could* be recovered through a rate increase of between $.10 and $.32 per space per day", but the statement is not supported by any evidence and is merely the opinion of the respondent's own employee. The respondent's belief that the costs of compliance with the new ordinance may be passed on to customers is mere speculation. The Court should not assume, therefore, that the petitioners' loss of parking spaces will not have a severe adverse financial impact on them.

Finally, in its statement of the case the respondent has overstated its reliance upon a concentration of parking lots for choosing the zoning districts made subject to the ordinance. The record is clear that the respondent's concerns about aesthetics in the downtown and midtown areas of Atlanta were central in its determination of which zoning districts to include. As the respondent itself has admitted in its brief, the landscaping requirements

imposed by the ordinance are near rapid transit stations. These stations will carry the bulk of visitors in the City of Atlanta during the 1996 Summer Olympics. Moreover, the director of the city's bureau of planning stated in his affidavit that the districts were chosen not only because of their concentration of parking lots but also because of the large amount of pedestrian traffic in these districts. He concluded that parking lots without landscaping can adversely affect the aesthetic quality of the downtown area. The reality is that the districts included were chosen in an effort to beautify an area of the city at the petitioners' expense in advance of the 1996 Olympics.

II. Petitioners' Reply To Respondent's Reasons For Denying The Writ

A. The Decision Of The Supreme Court Of Georgia Upholding The Parking Lot Ordinance Is In Conflict With *Dolan v. City of Tigard*.

The respondent contends that *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), is inapplicable because the challenged ordinance classifies entire areas of the city and contains no requirement that a portion of the petitioners' property be deeded to the city. In view of the facts of this case, respondent's argument is shortsighted.

The legislative determinations in question here are applicable to a small portion of only seven of the city's 38 zoning districts and, accordingly, are far from determinations "classifying entire areas of the city." Moreover, in the zoning districts in which these regulations are applicable, they are applicable only to those operating surface

parking lots having thirty or more spaces. Thus, while the ordinance may appear to be generic on its face, it is specific as applied.

Second, with respect to the requirement of the ordinance under review in *Dolan* that the landowner deed portions of her property to the city, it takes little imagination to compare the petitioners' landscaping burdens in this case – at their own expense on their own property – to the petitioner's greenway deed requirements in *Dolan*. The result is that the analysis utilized in *Dolan* is applicable to these facts and demands reversal of the Georgia Supreme Court's decision.

The respondent also contends that the regulations in issue are constitutionally indistinguishable from landscaped buffer requirements and zoning setbacks routinely utilized throughout the country, relying on *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). The respondent's reliance upon this case is misplaced. In *Gorieb*, the Court considered a zoning setback requirement "to which all buildings subsequently erected must conform," not a remedial zoning ordinance retroactively applied to existing legally permitted businesses. 274 U.S. at 604, 47 S.Ct. at 676.

Finally, the respondent argues that the petitioners' application of the *Dolan* rough proportionality test to this case is inappropriate. In *Dolan*, the Court considered "whether the degree of exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." ___ U.S. at ___, 114 S.Ct. at 2318. The test the Court settled upon placed the burden on the city to "make some sort of

individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at ___, 114 S.Ct. at 2319-20.

The *Dolan* rough proportionality test is applicable to this case because the respondent has added conditions in the form of expensive landscaping requirements to petitioners' continued operation of their parking lots, not unlike the greenway dedication requirements the city imposed on the petitioner's continued operation of her supply store in *Dolan*. The question presented is whether the respondent has met its burden of proving that its landscaping conditions are "related both in nature and extent" to the petitioners' lawful use of their parking lots. The reason the respondent wants the Court to believe the *Dolan* test is inapplicable here is obvious – the respondent cannot meet the burden placed on it under the test.

In order to correct the Supreme Court of Georgia's erroneous reading of *Dolan*, petitioners' application for writ of certiorari should be granted.

B. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Requires The Owners And Operators Of Surface Parking Lots Within The Affected Zoning Districts To Make Improvements That, While Perhaps Valuable To Others, Are Useless To Them.

In response to petitioners' reliance on *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), and *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 36

S.Ct. 204, 60 L.Ed. 392 (1916), the respondent contends that the holdings of these cases are no longer applicable due to intervening regulatory takings cases. The respondent has not attempted to distinguish *Norwood* or *Myles Salt Co.* from the facts of this case, nor does the respondent argue that these cases have been overruled. Instead, without any references or citations to the record, respondent contends that the special assessment analysis contained in *Norwood* and *Myles Salt Co.* is inapplicable here because the petitioners themselves allegedly created the need for the challenged regulations. This allegation is made even though the petitioners' parking lots were built before the challenged ordinance was enacted in strict conformity with building permits issued by the city and pursuant to building codes adopted by the city. The respondent's allegation that the challenged regulations were enacted due to the petitioners' own actions is unsupported by the record. Instead, the record supports petitioners' claim that the ordinance was enacted to enhance the aesthetic beauty of downtown Atlanta.

Finally, the respondent relies upon *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), for its argument that the petitioners must bear the burden of retroactive landscaping regulations if they desire to continue to use their property for parking purposes. The respondent's reliance on *Yee* for this proposition is misplaced. The only question decided in *Yee* was whether a rent control ordinance affecting mobile home parks constituted a physical taking of the owner's property. *Id.* at ___, 112 S.Ct. at 1530-31. The Court expressly refused to consider whether the ordinance violated the park owners' substantive due process rights and whether

the ordinance constituted a regulatory taking. *Id.* at ___, 112 S.Ct. at 1531-34. Accordingly, *Yee* fails to support the respondent's contention.

C. The Decision Of The Supreme Court Of Georgia Is In Conflict With Controlling Precedent Of This Court Because The Parking Lot Ordinance Violates The Equal Protection Clause Of The Fourteenth Amendment.

In response to the petitioners' equal protection claim premised upon the Parking Lot Ordinance's application to only seven of the respondent's 38 zoning districts and the omission of unpaved vacant lots and lots having less than thirty spaces, the respondent states that the chosen lots "create a greater negative impact." In other words, the respondent contends that it may legislatively determine that certain areas of the city are more important than others for aesthetic improvement purposes and that any such determination is *per se* rationally related to a legitimate governmental interest.

Contrary to respondent's belief, there is no rational basis for requiring some to improve themselves aesthetically at the owner's expense, while similarly situated others are allowed to remain in their present unkempt condition. The ordinance violates the petitioners' rights under the Equal Protection Clause.

This the 25th day of April, 1995.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

PARKING ASSOCIATION OF GEORGIA, INC. ET AL.
v. CITY OF ATLANTA, GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 94–1532. Decided May 30, 1995

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE O'CONNOR joins, dissenting.

Motivated by a desire to improve the attractiveness of its downtown region, the Atlanta City Council passed an ordinance requiring certain existing surface parking lots to include landscaped areas equal to at least 10% of the paved area and to have at least one tree for every eight parking spaces. The ordinance covers some 350 parking lots; petitioners estimate that compliance with the landscaping requirements will cost approximately $12,500 per lot, for a total of $4,375,000. Additionally, parking lot owners will lose revenue due to lost parking spaces and lost advertising dollars: the trees allegedly will obscure existing advertising signs and cause petitioners to lose contracts worth about $1,636,000.

Petitioners sought injunctive and declaratory relief on the ground that the Atlanta ordinance was an uncompensated taking of property in violation of the Fifth Amendment. The state trial court ruled in favor of the city. In a divided opinion, the Supreme Court of Georgia affirmed. 264 Ga. 764, 450 S. E. 2d 200 (1994). The Court held that the ordinance was neither a physical nor a regulatory taking. The Court relied on *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), to conclude that the ordinance was constitutional because it "advances legitimate governmental interests and

leaves the plaintiffs with an economically viable use in their property." The court distinguished *Dolan* v. *City of Tigard*, 512 U. S. ___ (1994), which requires a showing of rough proportionality between the conditions imposed and the impact of the owner's development, on the ground that although the city of Tigard had not made an "'individualized determination that the required dedication is related both in nature and extent to the impact of the development,'" 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3 (quoting *Tigard*, 512 U. S., at ___ (slip op., at 16)), the city of Atlanta had made a "legislative determination" with regard to many landowners, 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3, thus placing this case outside the reach of *Tigard*.

The lower courts are in conflict over whether *Tigard*'s test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature. In addition to the court below, at least one other court has relied upon the "legislative" character of state action to conclude that *Tigard* was inapposite and that the less stringent *Agins* standard should be applied. See *Harris* v. *City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994). Other courts, however, have applied *Tigard* to cases involving alleged legislative regulatory takings. In *Trimen Development Co.* v. *King Cty.*, 124 Wash. 2d 261, 877 P. 2d 187 (Wash. 1994), the Washington Supreme Court applied *Tigard* to an ordinance similar to the one at issue here. A King County Council ordinance required that developers seeking to build housing either dedicate land for public parks or pay a fee. Despite the fact that the ordinance was clearly a "legislative enactment," the Court applied *Tigard*'s rough proprotionality test. *Id.*, at 274, 877 P. 2d, at 194. See also *Manocherian* v. *Lennox Hill Hospital*, 84 N. Y. 2d 385, 393, 643 N. E. 2d 479, 483 (1994), cert. denied, ___ U. S. ___ (1995) (applying *Tigard* to alleged legislative taking).

It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Although *Dolan* purports to be an exception to *Agins*, the logic of these two cases appears to point in different directions. The lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict. *See Tigard*, 512 U. S., at ___ (slip op., at 8) (observing that certiorari was granted because the Oregon Supreme Court allegedly had misapplied *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987)). Where, as here, there is a conflict, the reasons for granting certiorari are all the more compelling.

Because the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts, I would grant certiorari.